

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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CONSOLIDATED INTERSTATE - CALLAHAN  
MINING COMPANY, a Corporation,  
Plaintiff in Error,

vs.

BERTHA D. WITKOUSKI, et al.,  
Defendants in Error.

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**Transcript of the Record**

**Filed**

MAY 1 1911

**F. D. Monckton,**  
Clerk.

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*Upon Writ of Error from the United States District  
Court for the District of Idaho,  
Northern Division.*



No. ....

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**Circuit Court of Appeals**  
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*Names and Addresses of Attorneys of Record*

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*Attorneys for Defendants in Error.*

*In the District Court of the United States for the  
District of Idaho, Northern Division.*

No. 657

BERTHA D. WITKOUSKI; and CHARLES F.  
WITKOUSKI and EUGENE D. WITKOUSKI,  
minors, by Bertha D. Witkouski, their Guardian  
Ad Litem, Plaintiffs,

vs.

CONSOLIDATED INTERSTATE - CALLAHAN  
MINING COMPANY, a Corporation,  
Defendant.

### COMPLAINT.

Come now the plaintiffs, and for cause of action  
against the defendant allege:

#### I.

That the above named plaintiffs are residents, citizens, and inhabitants of Shoshone County, State of Idaho, and residents of and within the judicial district and division of the above entitled Court.

#### II.

That Bertha D. Witkouski is the surviving widow of Charles Witkouski, and that prior to the death of the said Charles Witkouski, said plaintiff Bertha D. Witkouski and said Charles Witkouski were residing together as husband and wife in the County of Shoshone, State of Idaho.

#### III.

That said Charles F. Witkouski and Eugene D. Witkouski are the minor children of the plaintiff herein Bertha D. Witkouski, and the deceased,

Charles Witkouski, aged eight and five years respectively, and that prior to the institution of this suit, and on to-wit, the 11th day of July, A. D., 1916, the plaintiff Bertha D. Witkouski was appointed by the Probate Court of the County of Shoshone, State of Idaho, guardian ad litem of said minor children with authority to institute and prosecute this action as guardian ad litem of said minors, and this action is maintained by her for herself individually and as such guardian ad litem for and on behalf of her said children.

#### IV.

That the above named defendant is now and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of Arizona, and is now and at all of the times hereinafter mentioned was a citizen of the State of Arizona, authorized to and transacting business within the State of Idaho and doing business in the operation of a quartz producing mine in the Coeur d'Alene Mining District, County of Shoshone, State of Idaho, and within the judicial district and division herein designated.

#### V.

That the defendant herein does, and at all times hereinafter mentioned did and now does operate and control a certain zinc-lead mine in the County of Shoshone, State of Idaho; and at the time of the death of Charles Witkouski hereinafter referred to was engaged in the active development of said mine in and about said mine and said mining property.

VI.

That on the 18th day of May, A. D. 1916, Charles Witkouski was employed by defendant as a "pusher," and at the time of the happening of the accident hereinafter complained of, was, with three other fellow workmen, employed in the work of development of said mine and said mining property.

VII.

That the said mine in which said deceased was employed was operated by means of tunnels, stopes, shafts, and excavations constructed in the underground workings of said mine, consisting of a main tunnel, 6,000 feet approximately in length and branching off on the drift a distance of about 600 feet, to what is known as the "New Shaft" about 300 feet beyond the "Callahan Raise"; and at said point defendant had constructed and was using a vertical shaft extending from the tunnel level downward a distance of over 300 feet.

VIII.

That for the purpose of transporting workmen and materials from the tunnel level downward through said shaft and to different portions thereof and to the bottom thereof, said defendant used, owned and operated a certain hoist slip or skip with necessary mechanical devices and attachments, consisting among others of an engine operated by compressed air together with wheels, bolts, pulleys, cables and drum, and from the drum of said hoist there extended a cable about 800 feet in length, to the end

of which cable was attached a metal bucket fastened thereto and said bucket was attached to the cross-head fitted with shoes that ran upon and against perpendicular guides extending from the top to the bottom of said shaft, and said bucket, by the operation of said engine and the revolving of said drum and the winding or unwinding of said cable was raised and lowered to the top or bottom of said shaft and to intermediate points therein; and that at the time of the happening of the matters hereinafter complained of, one Joe Egbert, was employed by defendant and working as hoistman, charged solely with the operation, management and control of said engine and said hoist and everything in connection therewith.

#### IX.

That in the performance of the work required of deceased by defendant, it was his duty to work in said shaft hereinbefore referred to and in and about the workings thereof, and it was the duty and custom of deceased and the duty and custom of other employes of defendant in and about said shaft and the workings in connection therewith for a long time prior to the happening of the matters herein complained of, to go to and from their work by means of the bucket attached to the cable and operated by said engine, drum and cable as hereinbefore described, which bucket was raised and lowered as hereinbefore described, and that in pursuance of said custom and in accordance with the direction of said defendant, its agents, servants and employes, defendant entered



the mine of defendant on the 18th day of May, A. D., 1916, on the shift which regularly came to work at 11 o'clock P. M., and, together with three other employes of said defendant, got upon the bucket attached to said cable and said hoist as hereinbefore referred to and said bucket was by the hoistman in charge thereof attempted to be lowered into the shaft of said mine for the purpose of permitting said deceased and the other employes of defendant to reach the bottom of said shaft where they were to perform the duties required of them; that after said hoist had been started downward, suddenly and without warning, said cable and said bucket dropped downward a distance of approximately 150 feet at a violent, excessive and rapidly and suddenly increasing rate of speed, until deceased and the workmen who were upon said bucket, riding upon the same by standing upon the edge thereof and holding to the supports, rigging and cable thereof as was their custom, and the only place where they could ride or stand upon the same, a custom of which the defendant knew and in which it acquiesced, and which was the only way that said deceased and the other workmen could ride thereon,—said deceased and his coemployes became terror-stricken and frightened in the darkness that prevailed, the lights which they carried having been extinguished by the rapid and unreasonable rate of speed which said hoist had attained, and there being a general expression among them that the appliances had broken or given away, and the said deceased, terrified and frightened, on

account of the negligence and carelessness of defendant, its servants and agents, and on account of the confusion that had arisen by reason of said negligence and carelessness, reasonably concluding that there was greater danger to his life and safety in remaining upon said bucket and said hoist than in attempting to jump therefrom, and for the purpose of avoiding the imminent peril which was apparent by reason of the great and rapidly increasing rate of speed of said bucket, and by reason of the matters hereinbefore complained of, in the exercise of ordinary and reasonable care under all the circumstances then confronting him at the time and acting under intense excitement and upon the spur of the moment, thereupon jumped from said bucket and grabbed hold of some timbers on the side of said shaft, his hold upon said timbers being broken, and he fell to the bottom of said shaft, a distance of about 150 feet, inflicting injuries resulting in almost instant death.

#### X.

That in connection with the use and operation of said hoist or lift and as a part thereof, defendant used a drum around which the cable used in raising and lowering supplies and men was wound and unwound as the machinery was operated and on the outside of said drum and upon the end of said shaft was a mechanical contrivance known as a clutch, fastened to the shaft by means of four lugs, bolts, keys, or set screws, consisting of a band of metal or fibre, which was operated by means of a lever or brake, so that by pulling upon the brake or lever, the



clutch band was tightened, thus retarding and controlling the speed of the said hoist, and said brake and said lever were under the exclusive control and supervision of said hoistman.

## XI.

That said accident was caused and occasioned by and through the negligence of defendant in employing and keeping in its service the hoistman operating the engine hoist at the time of the happening of the matters herein alleged, and that said Egbert, the hoistman, was incompetent, inexperienced, nervous and excitable, and that defendant knew that said hoistman was not a fit and proper person to be intrusted with the operation and proper care of said hoist.

## XII.

That defendant, its agents, servants and employes were further guilty of negligence in the following particulars:

(a) In failing to furnish to deceased a reasonably safe place for the performance of the duties required of him.

(b) In failing to furnish to deceased proper, safe, suitable and adequate machinery, tools and appliances for the performance of the work required of him, in that, the bolts, lugs or keys by which the clutch was fastened to the shaft of the drum of said hoist were loose, worn out, unsafe and inadequate; that the brake band and clutch thereon, were worn out, loose, inadequate and unsafe, and that said clutch and the band thereof could

not be adjusted by said lever under the control of the hoistman so as to retard and control the speed of said hoist and prevent the same from attaining a dangerous rate of speed and from falling to the bottom of said shaft.

### XIII.

Plaintiffs further allege that at the time of the happening of the matters hereinbefore complained of there was in full force and effect in the State of Idaho an Act of the Legislature of said State, being Senate Bill No. 160, entitled "An Act Regulating the Operation and Equipment of Mines and Providing a Penalty for the Violation thereof", found at pages 266 to 271 of the Session Laws of the State of Idaho for the year 1909, passed at the Tenth Session of the Legislature of said State, and said defendant negligently, carelessly and unlawfully failed and neglected to comply with said law and negligently, carelessly and unlawfully violated the provisions of said law, as follows:

"Sec. 9. It shall be unlawful for any person to sink or operate a vertical or steeply inclined shaft to a greater depth than 250 feet without having the same equipped with a mine cage, skip or bucket fitted with safety clutches."

"Sec. 24. It is unlawful for any person, company or corporation to hoist or lower men at a greater speed than six hundred feet per minute;

\* \* \*"

and Section 15 of said Act, amended as Section 16 by Senate Bill No. 116, entitled "An Act to Amend Sec-

tion 10, Section 15 and Section 16 of Senate Bill No. 160, Session Laws of 1909, Page 266, being 'An Act Regulating the Operation and Equipment of Mines, and Providing a Penalty for the Violation thereof,' approved March 15, 1909," found at pages 133 to 134 of the Session Laws of the State of Idaho for the year 1915, passed at the Thirteenth Session of the Legislature of said State, as follows:

"Sec. 16. Every mining property using hoisting apparatus within the State of Idaho shall keep one copy of this entire code posted on the gallows frame, and a copy of the bell signals before the hoist engineer, and on each station. \* \* \*".

#### XIV.

That defendant negligently and unlawfully failed to comply with the law referred to in the preceding paragraph in the following particulars:

(a) That the shaft which defendant had sunk at the place where deceased met his death was a vertical shaft and extended to a depth of more than 250 feet, and that the same was not equipped with a mine cage, skip or bucket fitted with safety clutches, and that the bucket and hoist in connection with which deceased met his death was not in any manner equipped or fitted with safety clutches.

(b) That the men, including deceased, were being lowered into said shaft at a speed greater than 600 feet per minute of time.

(c) That a copy of said statute referred to was not posted as required by law on the gallows frame or at any other place in the vicinity of said working.

## XV.

Plaintiffs allege that the violation of said statute hereinbefore referred to was one of the causes of the death of deceased and that the deceased would not have been killed had defendant complied with the provisions of said statute, and that it was the duty of defendant to comply with the requirements of said law, and that said law was imposed for the benefit and protection of deceased, and was a duty which defendant owed to deceased for his safety from the injuries which resulted in his death.

## XVI.

That at the time of the happening of the matters herein complained of, and for some time prior thereto, it was the custom in mines operating generally in the district in which said accident occurred and for the defendant to promulgate, provide and enforce reasonable rules regulating the conduct and operation of hoists used for the purpose of transporting men and materials, and it was likewise the custom of said other mines in said district to adopt a rule or regulation requiring that the skip or hoist be raised and lowered before permitting the same to be used in transporting men and materials, and that had said hoist been raised and lowered before permitting deceased to ride thereon it could have been determined that said machinery was unsafe and out of repair, and defendant was guilty of negligence in failing to provide and enforce such reasonable rule and regulation.

## XVII.

That the death of said deceased was caused and occasioned wholly and exclusively by and through the negligence and carelessness of defendant, its servants and agents, and without fault or negligence on the part of said deceased.

## XVIII.

That said defendant, at the time of the happening of the matters herein complained of, and for some time prior thereto, had in its employ a master mechanic, whose duty it was, in accordance with the custom that prevailed in defendant's mining property, to inspect, care for and repair all defects found in said machinery and hoisting apparatus, and that it was no part of the duty of deceased to inspect or repair said hoist and deceased had nothing to do therewith, and that defendant was negligent in failing to properly inspect and repair said hoist and to place the same in a reasonably safe condition, and that had said master mechanic performed his said duty and had made an investigation of said hoisting apparatus, which it was his duty to do, the defective, unsafe and dangerous condition of said machinery and apparatus and appliances could and would have been discovered, and defendant knew of the dangerous, unsafe and defective condition of said machinery and appliances, or in the exercise of reasonable care could have ascertained such condition.

## XIX.

That the above named minors are the only surviving minor children of the deceased and that they,



together with Bertha D. Witkouski, are the only surviving heirs of said deceased.

XX.

That at the time of the happening of the death of said deceased he was thirty-seven years of age, strong, able-bodied, sound and robust mentally and physically, was industrious and devoted to his family and took great pains and care with their maintenance and education, and his family was dependent upon him for their support and maintenance.

That the said Charles Witkouski was earning and capable of earning at the time of his death and for a long time prior thereto upwards of \$6.00 per day. That had he lived, it was his intention to care and provide for his said family and to give the said minor children the benefit of an education. That they have been deprived of his love, comfort, advice, and counsel, and of his earnings and accumulations, and that by reason of all the matters and things herein set forth and of the acts of negligence of the defendant, the plaintiffs have sustained damages in the sum of FORTY THOUSAND DOLLARS (\$40,000.00).

WHEREFORE plaintiffs pray judgment against the said defendant in the sum of \$40,000.00, and for their costs and disbursements herein.

PLUMMER & LAVIN,  
Spokane, Wash.

THERRETT TOWLES,  
Wallace, Idaho,  
*Attorneys for Plaintiffs.*

State of Idaho,  
County of Shoshone,—ss.

BERTHA D. WITKOUSKI, being first duly sworn, deposes and says:

That she is one of the plaintiffs in the above entitled action; that she has read the foregoing complaint and knows the contents thereof, and believes the facts therein stated to be true.

BERTHA D. WITKOUSKI.

Subscribed and sworn to before me at Wallace, Shoshone County, Idaho, this 11th day of July, A. D. 1916.

(Seal) THERRETT TOWLES,  
Notary Public in and for the State of Idaho, residing at Wallace, Idaho.

Filed, July 13, 1916.

W. D. McReynolds, Clerk.

By L. M. Larson, Deputy Clerk.

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(Title of Court and Cause.)

No. 657.

### DEMURRER TO COMPLAINT.

Comes now the defendant in the above-entitled action and demurs to plaintiffs' complaint therein, and for grounds of demurrer thereto alleges that the said complaint does not state facts sufficient to constitute a cause of action.

JAMES A. WAYNE,  
Attorney for Defendant, residence and post-office address Wallace, Idaho.

(Service acknowledged.)

Filed, Aug. 7, 1916.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 657.

ANSWER.

Comes now the defendant above named and for answer to Plaintiffs' Complaint herein, admits, denies, qualifies and alleges as follows:

I.

Admits the allegations contained in paragraphs I, II, III, IV and V of said Complaint.

II.

Defendant admits that on the 18th day of May, 1916, Charles Witkouski was employed by defendant as foreman of a shaft crew in the Interstate Mine and admits that the foreman of a shaft crew is sometimes called a "pusher"; defendant denies that the said Witkouski at the time of his accident was with three other fellow workmen and alleges that in truth and in fact the said Witkouski was the foreman of a shaft crew consisting of himself and several other men.

III.

Defendant admits the allegations contained in paragraph VII of said Complaint, except that it denies that the shaft in which the said Witkouski was working at the time of his accident was over three hundred feet in depth.

IV.

Defendant admits the allegations of paragraph VIII of said Complaint, but in this connection alleges that the Joe Egbert mentioned in said paragraph



was the hoist engineer in the crew of the said Witkouski and was working under the immediate supervision and direction of the said Witkouski at the time of the latter's accident.

V.

Answering paragraph IX defendant admits that it is customary for its employees to go to and from their work in the bucket attached to the cable described in said complaint, but denies that this defendant, or any of its agents, servants, or employees, ever directed any employees of the defendant to go to and from their work by that means, or in that manner; defendant admits that on the night of May 18th, 1916, Witkouski got upon said bucket with three other employees of defendant and that the hoist man working under the direction and supervision of said Witkouski attempted to lower said bucket into the mine; defendant admits that after said hoist had been started downward it dropped rapidly for some distance, but denies that it suddenly and without warning dropped downward a distance of one hundred and fifty feet, or any distance whatsoever in excess of sixty feet; denies that said bucket, or hoist, dropped downward at a violent, excessive, or rapid, or suddenly increased rate of speed until the deceased and the workmen upon said bucket, or any of them riding upon the same were terror stricken or frightened, and denies that this defendant had ever acquiesced in any custom which permitted its employees to ride upon said bucket in the manner described in paragraph IX of said complaint; denies

that said hoist descended at an unreasonable rate of speed and denies that there was a general expression among said employees that any appliances had broken or given away; denies that the said deceased became terrified, or frightened on account of the negligence, or the carelessness of the defendant or its servants, or agents, and denies that there was any negligence or carelessness on the part of the defendant, or on the part of any of its agents, or servants, excepting on the part of the said Witkouski; denies that on account of the confusion that had arisen by reason of any negligence, or carelessness, that the said Witkouski reasonably concluded, or concluded at all that there was greater danger to his life or safety in remaining upon said bucket and said hoist than in attempting to jump therefrom and denies that there was any danger attendant upon remaining in said hoist whatsoever; denies that for the purpose of avoiding the imminent peril by reason of the great, or rapidly increasing rate of speed of said bucket, or by reason of any matters or things set up in said complaint, the said Witkouski in the exercise of ordinary, or reasonable care under all the circumstances then confronting him, or under intense excitement, or upon the spur of the moment, jumped from said bucket, or grabbed hold of any timbers on the side of said shaft; defendant admits that while the said Witkouski and three other employees were descending said shaft in said bucket, the speed of said bucket was slightly increased for a distance of approximately sixty feet and that the said Witkouski carelessly

and negligently and without any regard for his safety and for reasons unknown to this defendant, jumped from said bucket and fell to the bottom of said shaft sustaining injuries which resulted in his death; and further answering said paragraph IX this defendant alleges that the said bucket was stopped after having descended approximately 60 feet from the place where the speed thereof had first been increased; and that the three men who were in the said bucket were uninjured and that said Witkowski was injured solely and entirely by reason of his own carelessness and negligence in jumping from said bucket.

## VI.

Defendant admits the allegations contained in paragraph X of said complaint, except that it denies that the operation of said hoist, or the said brake, or clutch, or lever were under the exclusive control or supervision of said hoist man and alleges that in truth and in fact the said hoist was under the general supervision and control of the foreman of the shaft crew and that at the time said Witkowski met his death, the said hoist apparatus, including the said brake, lever and clutch were subject to the general supervision of said Witkowski.

## VII.

Defendant denies that said accident was caused or occasioned by, or through the negligence of defendant in employing or keeping in its service the hoist man operating the engine hoist at the time of the happening of said accident and denies that said hoist man was incompetent, or inexperienced, or ner-

vous, or excitable, and denies that defendant knew that said hoistman was not a fit and proper person to be intrusted with the operation and proper care of said hoist, and denies that said hoist man was an improper or unfit person to be entrusted with the operation and care of said hoist.

#### VIII.

Defendant denies that this defendant, or its agents, or its servants, or employees, save and except the said Witkouski were guilty of negligence in failing to furnish the deceased a reasonably safe place for the performance of the duties required of him, and denies that defendant did fail to furnish the deceased with a reasonably safe place in which to work; defendant denies that it failed to furnish to deceased proper or safe, or suitable, or adequate machinery, or tools, or appliances for the performance of the work required of him, and denies that the bolts, lugs, or keys by which the clutch was fastened to the shaft of the drum of said hoist were loose, or worn out, or unsafe, or inadequate and alleges that if the said bolts, lugs, or keys were in fact loose, worn out, unsafe, or inadequate, it was the duty of the said Witkouski to cause the said defects to be remedied, or reported to the said defendant, and defendant denies that the brake band, or clutch on said drum were worn out, or unsafe, or that said clutch, or said band could not be adjusted by said lever by the hoist man so as to retard or control the speed of said hoist and prevent the same from continuing at a dangerous rate of speed or from falling to the bottom of the shaft.

IX.

Defendant admits the existence of the laws of the State of Idaho, found at pages 266 to 271 of the Session Laws of the State of Idaho for the year 1909, but denies that defendant negligently, or carelessly, or unlawfully, or in any manner failed or neglected to comply with said law or negligently, or carelessly, or unlawfully, or in any manner violated any of the provisions of said law.

Defendant admits the existence of the laws of the State of Idaho found at pages 133 to 134 of the Session Laws of the State of Idaho for the year 1915, but denies that defendant negligently, or carelessly, or unlawfully failed, or neglected to comply with said law, or negligently, or carelessly, or unlawfully did in any manner violate any of the provisions of said law.

X.

Defendant denies that it negligently, or unlawfully, or in any manner failed to comply with said law, or any laws of said State of Idaho.

XI.

Answering paragraph XIV of said complaint this defendant denies that it negligently or unlawfully, or in any manner whatsoever failed to comply with the law or laws referred to in paragraph XIII of said complaint; admits that the shaft in which the said Witkouski was descending at the time of his death was a vertical shaft more than 250 feet in depth, to-wit, of about the depth of 300 feet, but de-



nies that said shaft was not equipped with a mine cage, or skip, or bucket fitted with safety clutch; denies that the bucket and hoist mentioned in said complaint was not equipped or fitted with safety clutches and alleges that in truth and in fact the said bucket was equipped with safety clutches; denies that the said Witkouski and the men in the bucket with him were being lowered at a speed greater than six hundred (600) feet per minute, and alleges that in truth and in fact the said bucket was being lowered at a rate of speed much less than six hundred feet per minute.

Further answering paragraphs XIII and XIV of said complaint, the defendant alleges that all of the laws referred to in said paragraphs, to-wit, Senate Bill No. 160 found at pages 266 to 271 inclusive of the Session Laws of the State of Idaho for the year 1909, constitutes and is a penal statute and that any violation thereof is made a misdemeanor under the terms of said act, subjecting the guilty party to fine or imprisonment, or both such fine and imprisonment and no other penalty or punishment whatsoever.

## XII.

Answering paragraph XV of said complaint, defendant denies that the alleged violation of said statute referred to in said complaint was one of the causes of the death of deceased and denies that deceased would not have been killed had defendant complied with the provisions of said statute, and denies that defendant did not comply with the provisions of said statute; defendant denies that

it was the duty of defendant to comply with the requirements of said statute and alleges that if the defendant did not comply with the requirements of said statute that its default, or defaults in this respect were well known to the said Witkowski and that the latter continued to work in the service of the defendant with full knowledge of said facts; defendant denies that said law was passed for the benefit or protection of the deceased, and denies that it was a duty which defendant owed to deceased for safety from injuries which resulted in his death.

### XIII.

Defendant admits that it was the custom in mines operating generally in the Coeur d'Alene District to promulgate, provide and enforce reasonable rules regulating the conduct and operation of hoists used for the purpose of transporting men and materials, and alleges that in truth and in fact this defendant had promulgated, provided and attempted to enforce such reasonable rules at the time said Witkowski met his death; admits that it was customary to require that the skip, or hoist be raised or lowered before permitting the same to be used in transporting men and materials and alleges that it was the duty of the foreman of the hoist crew to enforce such regulation and that it was the duty of the said Witkowski, as foreman of the hoist crew, on the night of the said accident to cause said skip to be raised and lowered before ordering his men therein and before going therein himself; defendant denies that by the raising

or lowering of said skip, or hoist, it could have been determined that said machinery was unsafe, or out of repair and denies that said machinery was unsafe or out of repair; denies that defendant permitted the said Witkouski to ride upon said skip and denies that defendant was guilty of negligence in the failure to provide or enforce such reasonable rule or regulation, or any reasonable rule or regulation whatsoever.

#### XIV.

Defendant denies that the death of the said Witkouski was caused, or occasioned wholly or exclusively by or through the negligence or carelessness of the defendant, or its agents, or its servants, or without fault or negligence on the part of the said Witkouski and alleges that in truth and in fact the death of the said Witkouski was caused or occasioned wholly and entirely by reason of his own negligence and carelessness.

#### XV.

Defendant denies that it was the duty of its master mechanic to inspect said machinery or hoist apparatus and denies that it was no part of the duty of the said Witkouski to inspect said hoist and alleges that in truth and in fact it was the duty of the said Witkouski, as foreman of said hoist crew, to inspect said hoist and hoisting machinery and if he found any defects therein to refer the same to said master mechanic in order that said defects be remedied and said repairs be made; defendant denies that the said



Witkowski had nothing to do with the inspection of said hoist and hoisting machinery; denies that defendant was negligent in failing to properly inspect or repair said hoist, save and except that defendant alleges that said Witkowski, whose duty it was to inspect said hoist and hoisting machinery on the night of his said accident, carelessly and negligently failed to inspect the same and denies that defendant was negligent in failing to place said hoist in a reasonably safe condition and alleges that in truth and in fact the said hoist was in a reasonably safe condition; denies that had said master mechanic performed his said duty, or made an investigation of said hoist apparatus, the defective or unsafe, or dangerous condition of said machinery, or apparatus, or appliances could, or would have been discovered and denies that it was the duty of said master mechanic to make said inspection; defendant denies that it knew of the dangerous, unsafe, or defective condition of said machinery or appliances, or in the exercise of reasonable care could have ascertained such condition and denies that such machinery or appliances were dangerous, or unsafe or in a defective condition.

## XVI.

Defendant denies that at the time of the death of the said Charles Witkowski, or for a long time prior thereto, or at any time, the said Witkowski was earning, or capable of earning upwards of \$6.00 per day, or any sum in excess of \$5.00 per day; defendant denies that by the death of the said Witkowski, or by

any acts of negligence of the defendant the plaintiffs have sustained damages in the sum of Forty Thousand (\$40,000.00) Dollars, or in any sum or sums whatsoever.

#### XVII.

Further answering said complaint and as a first affirmative defense thereto, this defendant alleges that the injuries suffered by the said Witkowski and his death as a result of said injuries, were brought about and occasioned solely and entirely because of the carelessness and negligence of said plaintiff in not using due care and caution in respect to his work and particularly with reference to the inspection of said hoist and hoisting machinery and his failure to inspect the same before causing the same to be used and by reason of his carelessness and negligence in jumping from said skip, cage, or hoist, while the same was in motion.

#### XVIII.

Further answering said complaint and as a second affirmative defense thereto, this defendant alleges that plaintiff was at the time of his accident and death an adult person, in the full possession of all his mental faculties and of large experience in and about mines; that in entering into the employ of the defendant it was part of the consideration for such employment, and the plaintiff agreed thereto, that all risks, dangers and damages which were or might be sustained by said plaintiff in pursuing such employment as he was engaged in at the time of his

injury and death as alleged in said complaint were assumed by said plaintiff and that for such injury, risk or danger neither the defendant nor any one for whom it was responsible, should be liable in any degree or to any extent therefor whatsoever.

XIX.

Furthering answering said complaint and as a third affirmative defense thereto, this defendant alleges that said Witkouski at the time of his death assumed the risk attendant upon the use of said hoist before accepting the same and also assumed the risk of jumping from said hoist as it descended in said shaft while the hoist or skip, or cage was in motion.

XX.

WHEREFORE defendant prays judgment that plaintiff take nothing by his said action, that said action be dismissed and that defendant recover its costs and disbursements herein.

JAMES A. WAYNE,

Attorney for Defendant, Residence and Post Office  
address, Wallace, Idaho.

State of Idaho,

County of Shoshone,—ss.

C. W. Newton being first duly sworn on his oath deposes and says that he is the designated agent and the Manager of the defendant corporation and makes this verification for and in behalf of said defendant; that he has read the foregoing Answer and knows the contents thereof and believes the facts therein stated to be true.

C. W. NEWTON.

Subscribed and sworn to before me this 21st day  
of October, A. D. 1916.

(N. P. Seal)     ALBERT H. FEATHERSTONE,  
Notary Public in and for the State of Idaho, residing  
at Wallace, Idaho.

(Service acknowledged.)

Filed Nov. 3, 1916.

W. D. McReynolds, Clerk.

By Pearl E. Zanger, Deputy.

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(Title of Court and Cause.)

No. 657.

VERDICT.

We, the jury in the above entitled cause, find for  
the plaintiffs and assess their damages against the  
defendant in the sum of \$15,000.00, Fifteen Thous-  
and.

ARCHIE A. GOLLEN,

Foreman.

Filed Nov. 25, 1916.

W. D. McReynolds, Clerk.

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(Title of Court and Cause.)

No. 657.

JUDGMENT ON VERDICT.

This action came regularly on for trial in open  
court on the 24th day of November, A. D. 1916, be-  
fore the court and a jury of twelve good and lawful  
men drawn and selected from the Northern Division  
of this District to try said cause. Messrs. Plummer  
& Lavin and Therrett Towles, Esq., appearing as

attorneys for plaintiffs and James A. Wayne, Esq., appearing as attorney for defendant; whereupon witnesses were sworn and testified and documentary evidence introduced on behalf of defendant, and, after the introduction of all of the evidence as aforesaid, the cause was argued by respective counsel, and after argument of said counsel the court instructed the jury, thereupon the jury retired to consider of their verdict and subsequently, to-wit, on the 25th day of November, A. D. 1916, returned into court and announced that they had arrived at and returned their verdict, which said verdict was duly filed and is in words and figures following, to-wit:

*"In the District Court of the United States for the  
District of Idaho, Northern Division.*

Bertha D. Witkouski, in her own behalf and as  
Guardian ad Litem of the persons and inter-  
ests of Charles Witkouski and Eugene Wit-  
kouski, minors, *Plaintiffs,*

vs.

Consolidated Interstate-Callahan Mining Com-  
pany, a corporation,

*Defendant.*

No. 657.

### VERDICT.

We, the jury in the above entitled cause, find for the plaintiffs and assess their damages against the defendant in the sum of \$15,000.00, Fifteen Thousand.

ARCHIE A. GOLLEN,  
Foreman."



And thereupon said jury was duly polled, and each of said jurors was asked if said verdict of Fifteen Thousand (\$15,000.00) Dollars was his verdict, and each and all of them replied that it was.

NOW, THEREFORE, by reason of the law and the premises and the verdict aforesaid, it is hereby ORDERED, ADJUDGED AND DECREED that Bertha D. Witkouski, in her own behalf, and as Guardian ad Litem of the persons and interests of Charles Witkouski and Eugene Witkouski, minors, the above named plaintiffs, do have and recover of and from the Consolidated Interstate-Callahan Mining Company, a corporation, the above named defendant, the sum of Fifteen Thousand (\$15,000.00) Dollars, together with plaintiffs' costs and disbursements necessarily incurred herein and taxed in the further sum of Two Hundred Nine and 35/100 (\$209.35) Dollars, which said sums are to bear interest at the rate of seven per cent per annum from the date hereof, and judgment is hereby entered on the verdict aforesaid.

Dated November 25th, 1916.

W. D. McREYNOLDS, Clerk.

Filed November 25, 1916.

W. D. McReynolds, Clerk.

By Pearl E. Zanger, Deputy.

JOURNAL ENTRY (Record of Trial).

At a stated term of the District Court of the United States for the District of Idaho, held at Coeur d'Alene, Idaho, on Friday the 24th day of November, 1916.

Present: Hon. Frank S. Dietrich, Judge.  
Bertha D. Witkouski, et al.,

vs.

Consolidated Interstate-Cal-  
lahan Mining Company.

Civil No. 657.

This cause came regularly on for trial before the court and a jury, Messrs. Plummer & Lavin and Therrett Towles appearing as counsel for the plaintiffs, and James A. Wayne, Esq., appearing for the defendant. The clerk under direction of the court proceeded to draw from the jury box the names of twelve persons, one at a time, written on separate slips of paper and folded, to serve as a jury in this trial; Newton Arment, whose name was drawn from the jury box, who was sworn on voir dire, examined and passed for cause, was excused by the court upon the plaintiffs' peremptory challenge; Nick LaFrance, Charles F. Evans and Herman Lawson, whose names were drawn from the jury box, who were sworn on voir dire, examined and passed for cause, were excused by the court upon the defendant's peremptory challenge. Following are the names of the persons whose names were drawn from the jury box, who were sworn on voir dire, examined and accepted by counsel for both the plaintiffs and defendant, and who

were sworn by the clerk to well and truly try said cause and a true verdict render therein, to-wit: Malcom Bruce, Hugh Ross, Dennis Blake, D. W. Fredenburg, A. A. Gallon, William McLachlin, Carl Klockman, Peter Dillinger, L. A. Brainard, J. J. Hurm, C. F. Rudolph and John Amblie.

After a statement of plaintiffs' case to the jury by her counsel, Edward P. Moran, Herbert Erickson, Joe Egbert, Al Ringquist, Jonas Jacobson, J. H. Litton, Tom Hare, G. O. Gileace and Bertha D. Witkouski were sworn and examined as witnesses on the part of the plaintiffs, and here the plaintiffs rest.

The defendant's counsel expressing a desire to make a motion without the presence of the jury, the court after admonishing the jury excused them and they retired from the court room. The defendant now moves the court for a dismissal of the cause upon non-suit, which motion was argued before the court by counsel for the respective parties, after which the court announced its decision and denied the motion.

After a statement of the defense by defendant's counsel, Herman Gregory, Norman McDonald, Charles Meade, G. C. Carr, Ray Deline, and Edward E. Hughes were sworn and examined, and Joe Egbert was recalled and examined as witnesses on the part of the defendant.

Whereupon the court after admonishing the jury, excused them until 9:30 A. M. November 25th, 1916, continuing further trial herein until that time.



Saturday, November 25, 1916.

Bertha D. Witkouski, et al.,

vs.

Consolidated Interstate-Cal-  
lahan Mining Company

Civil No. 657.

This cause came regularly on for further trial before the court and jury, counsel for both the plaintiffs and defendant being present, the jury was called by the clerk and all found present. Whereupon Norman McDonald was recalled and further examined as a witness and documentary evidence was introduced on the part of the defendant, and here the defendant rests.

On rebuttal Edward P. Moran was recalled and further examined as a witness on the part of the plaintiffs and here both sides close.

The defendant here moves the court to instruct the jury to return a verdict in favor of the defendant, which motion was denied by the court.

The court thereupon delivered its instructions to the jury, after which they retired to consider of their verdict, having been placed in charge of A. L. Branch, a bailiff duly sworn.

On the same day the jury returned into court, and upon being asked if they had agreed upon a verdict, they, through their foreman, replied that they had and thereupon presented to the court their written verdict, which was in the words and figures, following:



the days of the November term of the District Court of the United States for the District of Idaho, Northern Division, before the Honorable Frank S. Dietrich, presiding as Judge of said court and a jury, this cause came on for trial on the pleadings heretofore filed herein, Mr. Therrett Towles and Mr. W. H. Plummer appearing as attorneys for the plaintiffs and Mr. James A. Wayne appearing as attorney for the defendant.

And thereupon the plaintiffs to maintain the issues on their part introduced the following evidence, to-wit:

EDWARD P. MORAN, produced as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION By

MR. PLUMMER:

Q. What is your name?

A. Edward P. Moran.

Q. Where do you reside?

A. At the Interstate at present.

Q. The Interstate mine, I believe you mean that?

A. Yes.

Q. When you use the word Interstate, you mean the defendant the Interstate-Callahan Consolidated mines?

A. Yes, sir.

Q. How long have you been working there, Mr. Moran?

A. Since the first of the year.

Q. You were working there at the time of the death of Mr. Witkouski, were you?

A. I was.

Q. In what capacity were you working, what kind of work were you doing?

A. Sinking a shaft.

Q. Where was that shaft located with reference to the mine, just in a general way,—I don't care particularly.

A. About a mile and a half in the tunnel.

Q. The mouth of the shaft, however, came up into a tunnel—the whole thing was underground, I assume?

A. Yes.

Q. Who was with you in sinking this shaft?

A. Herb Erickson, Aleck Davey, and Charlie Witkouski.

Q. What office or what position did Witkouski hold?

A. He was pusher.

Q. Is that the same as straw boss, as we understand it?

A. Just about.

Q. In other words, he had charge of just you men there, I assume, in sinking this shaft?

A. Yes.

Q. Who had charge of the hoist at the time he was killed?

A. Joe Egbert.

Q. Who had charge of him, I mean with reference to the hoist?

A. Well, Charlie Witkouski had charge over him, that is, in giving signals and giving him orders about timber and one thing and another.

Q. But I mean about taking care of the hoist, who did boss him with reference to that? Who would he report to about the difficulties—

A. He reported to McDonald, or the master mechanic.

Q. What position did Mr. McDonald hold?

A. He was foreman.

Q. And the master mechanic was whom?

A. Mr. Hughes.

Q. I understand you to say then that the only thing he had to do with the hoist man was to tell him when to hoist up and when to hoist down, and when to put timbers in the bucket to let down?

MR. WAYNE: I don't think he should lead the witness.

THE COURT: Yes, avoid leading questions. He has already answered it.

MR. PLUMMER: Q. Did you go on shift with Mr. Witkouski on this occasion when he was killed?

A. I did.

Q. What time of day was that?

A. We left about half past ten or twenty minutes after ten, and arrived in there about ten minutes to eleven, and went on shift at eleven.

Q. What did you do before you went down the shaft?

A. We put on about three coils of cable on the drum. They were re-coiling the cable at the time.

Q. It took two or three men to do that, did it?

A. It took the crew; we were all three.

Q. What do you mean by the drum?

A. The drum of the hoist.

Q. Do you mean that the cable that hoisted the bucket up, that you was looping it on the drum?

MR. WAYNE: I object to counsel leading the witness. There is a way to get at that, if it is material.

MR. PLUMMER: I don't want to lead, Your Honor, excepting in a matter that can't be disputed, Your Honor. I want to get over the ground.

MR. WAYNE: I object to getting over the ground by Mr. Plummer testifying.

MR. PLUMMER: I am not testifying.

Q. Tell what you were doing about rolling this cable on to the drum, and what it was, and what it was made of, and how you put it on.

A. This cable was a new cable, and we had to re-coil it every once in a while, on account of it stretching and making a lump in the cable, which, when hoisting or anything, would make the cable jump and wear it out, so we would have to re-coil it occasionally, and they were just finishing re-coiling the cable—that is, we finished it; they had about three coils to put on, and we told them we would finish the job, and their time was up, and we finished re-coiling the cable. And the other shift had left one man down at the bottom of the shaft to lay the cable, because generally when we was re-coiling the cable we would pull the cable all down to the bottom of the



shaft, and re-coil it, by hauling it up above and straightening it up on the drum.

Q. That was done preliminarily to getting down the shaft?

A. Yes sir.

Q. When you got ready to go down the shaft what did you do?

A. We put in about five lagging in a bucket. We hoisted the bucket up from the bottom at first, to the top, and we put in five lagging in the bucket, and we got, the four of us got on the bucket to go down.

Q. How did you get on?

A. We got on the rim of the bucket.

Q. Describe how you was on the rim of the bucket.

A. We were standing on the rim of the bucket, holding with one hand or both hands on a chain, two chains attached to this bucket.

Q. Was Charlie Witkouski one of this crowd?

A. He was. He was facing me, hanging on the same chain I was.

Q. How long had you worked there in that shaft?

A. From the time it started.

Q. How long was that?

A. I think it started—I am not quite certain, but either February or March, the 20th.

Q. How long had that custom existed with reference to being lowered down the shaft in the way you have described, with the men standing on the rim of the bucket, as you have described?

MR. WAYNE: I object to that as immaterial, if Your Honor please. It is not one of the charges of negligence in this case that there was anything improper in the manner in which they were lowered down.

MR. PLUMMER: Of course we can't tell—

THE COURT: I think I will let them show the conditions under which the accident happened, and this would be one of them; otherwise the jury might get the impression that it was unusual, that maybe it was unusual.

MR. PLUMMER: We have admitted that it was usual, but we didn't acquiesce in it. Therefore I have assumed that fact, and ask how long it had existed, how long they had been going down in that way.

MR. WAYNE: We will be given an exception to every adverse ruling, Your Honor?

THE COURT: All adverse rulings will be deemed to be excepted to.

A. Since the shaft was started.

Q. How long before the accident, about how long?

A. Almost three months, I think.

Q. And you had three shifts a day that did the same thing?

A. Yes, sir.

Q. When you got on to this bucket, and after you had been around the hoist, as you have described, putting this coil on, you and the gang, did you notice anything about the hoist to indicate that there was

going to be any slip or anything, or any defect in it, or anything of that kind?

A. I did not.

Q. When you started down on this bucket, you and the gang with you, you and Mr. Witkouski, just describe what happened from that down, now, in your own language.

A. We got on the bucket, at the collar of the shaft, and started down, with these lagging in the bucket, five lagging, and we started off naturally, as we always had, until we got about thirty feet down the shaft, and we got about thirty feet, and I passed the remark to the rest of the boys, I says, "We are going quite fast this evening," and I no more than had them words out of my mouth until Charlie Witkouski said, "There is something wrong," and he held on to the cable with—on to the chain with one hand, and tried to grab the timber with the other.

Q. Where was this timber?

A. Dividers. This was a three compartment shaft. He tried to catch one of the dividers with his arm; and I see—my light was shining on him so I could see him, and I see he didn't make it, so I saw there was no chance for the rest of us, and so I thought I would stay with the bucket. He left go the chain with his hand, and he tried to grab the divider further down with both hands, and I seen him make about a turn or two in the air until my light went out too, and after my light went out we didn't know what happened; but the bucket started to slacking up, and as the bucket slackened up the hoist

man finally stopped the bucket, and Herb Erickson got off on the manway side, and Aleck Davey and I went down to the bottom, and when we got down to the bottom Charlie Witkouski was laying dead, with Billy Reese holding his head up. So I says to Billy Reese, I says—

MR. WAYNE: I object to that as hearsay, Your Honor.

MR. PLUMMER: I think it is part of the res gestae.

MR. WAYNE: What this witness said isn't material.

MR. PLUMMER: Certainly; it is part of the res gestae. It happened at that particular time.

THE COURT: Objection sustained.

MR. PLUMMER: Q. How fast, in your estimation, was the bucket going, dropping, I mean, going down, when Witkouski made the remark that there was something wrong—in your estimation about how many feet per second, as near as you can judge?

A. At the time when he said there was something wrong, to the best of my estimation—how do you want that—in minutes?

Q. I would like to have it about how many feet per second, as near as you can judge? I don't suppose you can be accurate, but you saw him and I didn't.

A. About twenty to twenty-five feet per second.

Q. State whether or not the speed accelerated and went faster after that?

A. It went faster after that.

Q. What is the fact with reference to the speed increasing substantially after that? Can you describe how it did increase?

A. Well, it went faster, but I don't know how far exactly, because it was very hard to judge.

Q. State whether or not the whole thing happened very quickly, within a few seconds?

MR. WAYNE: I don't think counsel should insist on leading the witness, if the Court please.

MR. PLUMMER: That isn't leading.

MR. WAYNE: I am addressing my objection to the Court, Mr Plummer.

MR. PLUMMER: I understand that.

THE COURT: Objection sustained.

MR. PLUMMER: Q. How long a time did this whole thing consume from the time Witkouski made the remark that he thought there was something wrong until he made a jump and was killed or fell?

A. It was a matter of but a very few seconds.

Q. About how fast was the bucket going when he jumped to grab these timbers? How fast do you think it was going then?

A. It was going about twenty-five, to the best of my estimation, about twenty-five feet per second.

Q. State whether or not it was light or dark in the shaft, outside of the lights. I don't mean what illumination your lights gave that you were carrying.

A. It was perfectly dark outside of the electric lights at the bottom.

Q. As you and the gang you was with went down did you have any lights?



A. We all had lights.

Q. What kind of lights?

A. Carbide lamps.

Q. And as you were going down what, if anything, did the speed you were going at, what effect did it have on these lights?

A. It took our hats off, with our lamps on our hats.

Q. You mean the speed lifted them right off?

A. Lifted our hats off.

Q. About how much do you weigh, Mr. Moran?

A. About a hundred and seventy.

Q. How much did Mr. Witkouski weigh, approximately?

MR. WAYNE: I don't see the materiality of this.

MR. PLUMMER: I want to show the weight of this whole load and its operation on the hoist, as the basis for expert testimony.

MR. WAYNE: That is not a question in this case. They have designated certain acts of negligence. In so far as the hoist is concerned, they have alleged certain defects. They are confined in their proof to those defects which they have alleged. There is no allegation that it was carrying more than a hoist of that capacity should carry, or that it was carrying too great a weight.

THE COURT: I don't understand that to be the claim now. It is simply preliminary to some other question. It isn't contended that the hoist was overloaded?



MR. PLUMMER: Oh no.

THE COURT: All right. He may answer.

MR. PLUMMER: Q. How much did Witkowski weigh?

A. About a hundred and forty or forty-five.

Q. Without going into details, about how much did the whole thing weigh, take the bucket and the lagging, and the four men on it, and the appliances of the bucket, cross-bar, and the whole thing, about what did the whole thing weigh there, as close you can estimate it?

A. Close on to twelve hundred pounds.

Q. What did you think yourself as to the danger of injury to yourself, or death to yourself, by reason of the speed that you was being taken down that shaft at that time?

MR. WAYNE: I object to that, if the Court please, as incompetent, irrelevant and immaterial.

THE COURT: Overruled.

MR. WAYNE: An exception.

MR. PLUMMER: Q. What did you think?

A. I thought at first that we were going to be piled up in the bottom. But I see we were going too fast, that we couldn't make it, and I thought I would take a chance.

Q. Take a chance of going down with it, rather than do what Witkowski did?

A. Yes.

Q. State, if Witkowski had of happened to have got hold of the lagging he was grabbing for, or the timber you speak of, did it appear to you that the

danger was sufficient to justify you in making a like attempt to jump out and grab this?

MR. WAYNE: The same objection to that question.

THE COURT: Overruled.

(Last question read.)

A. It did, if he had caught.

MR. PLUMMER: You may take the witness.

CROSS EXAMINATION BY MR. WAYNE:

Q. Mr. Moran, how long had you worked in this shaft?

A. From the time it was started.

Q. And that was some time about the 8th of March, 1916, was it not?

A. Well, the station was cut at that time, but I don't think we started on the bonus until the 20th.

Q. You worked on Witkouski's shift all the time that you worked on that shaft, didn't you?

A. Yes, I did.

Q. And it was what was called the new shaft?

A. It was.

Q. And it was in process of being sunk at the time of this accident?

A. Yes.

Q. And it was customary where a shaft is being sunk, and before it has finally been finished up, to use a bucket rather than a cage, is it not?

A. Yes, sir.

Q. That is always the custom?

A. Yes, sir.

Q. And the buckets used elsewhere where you

have worked were of the same general type as this bucket?

A. They were.

Q. Now you were on the night shift that night?

A. Yes, sir.

Q. And the shaft crew that you worked on consisted of Witkouski, yourself, Erickson, Davy, and Egbert, did it not?

A. Yes, sir.

Q. And you called Witkouski the pusher?

A. We did.

Q. But as a matter of fact he was boss of that gang, was he not?

A. Yes.

Q. And he gave orders to all of you, did he not?

A. He gave orders to us and the hoist man, according to the timber and things like that, as far as I know.

Q. And you had formerly seen Witkouski on different occasions order Egbert what to do and what not to do, had you not?

A. Yes, sir.

MR. PLUMMER: If Your Honor please, I don't think that is proper cross examination. I think he ought to confine it to whether, with relation to the hoist itself, or giving signals to raise and lower it. It might be misunderstood. It is a kind of composite question.

THE COURT: Well, you can make it clear later if you think it is not clear.

MR. WAYNE: Q. And you had even seen and

heard Witkouski order Egbert to other parts of the mine, had you not, to get powder and fuse?

A. Yes.

Q. And Egbert always obeyed his orders, did he not?

A. He did.

Q. And on the occasions when Egbert would be sent by Witkouski to other portions of the mine, Witkouski himself would run this hoist wold ne not?

A. He has, yes.

Q. And you have seen him do it?

A. Yes.

Q. You knew, all of you, when you went to work at about eleven o'clock this night of the accident, that the crew which preceded you had been re-coiling the cable?

A. Yes, sir.

Q. That crew was Jonas Jacobsen's, was it not?

A. Yes.

Q. And a man by the name of Lytton was the hoist engineer, was he not?

A. I think so.

Q. And you in connection with Witkouski and the other men on your shift, had on other occasions re-coiled the cable on the drum, had you not?

A. We had.

Q. And it was customary and proper when you were re-coiling the cable to first loosen the clutch, so as to pull the cable off without pulling against the clutch, isn't that correct?

A. That I don't know.

MR. PLUMMER: We object to that as not proper cross examination. I haven't gone into what they had to do in order to put the cable on. That is part of their case, if they want to show assumption of risk or contributory negligence.

MR. WAYNE: The witness testified that they finished the job. I want to show that because of the fact, that is, that the cable was not completely recoiled, that they knew the condition the hoist would have to be put in.

THE COURT: The objection is overruled.

MR. WAYNE: What did you answer?

A. That I don't know.

Q. You don't know whether they would or not?

A. No.

Q. When you went on shift did you hear either Jacobsen or Lytton tell Witkouski that they had loosened the clutch?

A. No.

Q. The job of re-coiling the cable was not finished when you went to work?

A. It was not.

Q. And Witkouski told Jacobson and the men on his crew to go off shift, that he and his men would finish the job, didn't he?

A. Yes.

Q. And then you did re-coil about how many feet of cable?

A. About three coils on the drum.

Q. Now it is nothing unusual for a new cable to get these kinks, as you call them, in it?

A. No.

Q. And it has to be pulled off the drum by the men and then re-coiled?

A. Yes.

Q. Do you re-coil it by hand or with the engine?

A. With the engine.

Q. And as it is re-coiled on the drum the men straighten out the kinks so that it may wind up as near perfectly as possible?

A. Yes.

Q. Now, after Witkouski told the other men that he would finish the job, and after the job was finished, what did he next do? He began with the rest of you men to fill the bucket up with lagging, didn't he?

A. We put in five lagging in the bucket.

Q. The lagging you were using at that time was fir, was it not, fir lagging?

A. Yes, I think it was.

Q. And it was pretty wet too, wasn't it?

A. Well, like any ordinary lagging would be, green timber.

Q. Yes, it was green timber?

A. Yes.

Q. And it was five foot lagging?

A. Two inch lagging, five foot long.

Q. Five foot long, and of random widths?

A. The average width would be about twelve inches.

Q. And some of them as wide as twenty-four, weren't they?



A. Well, there were some of them, yes.

Q. Isn't it a fact that it was strictly against the orders and instructions to carry men on the bucket when it had anything else in it, either lagging, or materials, or muck?

MR. PLUMMER: We object to that as not cross examination.

THE COURT: Overruled.

MR. PLUMMER: And, besides that, it is admitted in the pleadings that it was customary to do that.

MR. WAYNE: No, it isn't.

MR. PLUMMER: Well, I say it is.

A. Yes, it is customary to take timber down with us.

MR. WAYNE: Q. Hadn't you heard McDonald finding fault with Witkouski a few weeks before this for riding on a bucket that had other materials in it?

MR. PLUMMER: The same objection, on the ground that it is not cross examination, and an attempt to prove contributory negligence on cross examination, when there has been nothing of that kind indicated on the direct examination.

THE COURT: Overruled.

MR. PLUMMER: An exception.

MR. WAYNE: Go ahead.

A. I do not know.

Q. You don't remember whether you did or not?

A. No.

Q. Now, after the lagging was loaded in the bucket who told you to get upon the bucket?

A. Nobody. It is customary for us to get on without being told.

Q. On this particular night didn't Witkouski order the men on the bucket, or do you remember?

A. I do not remember.

Q. Now, the manner in which you got upon the

Q. You don't remember whether you did or not?

A. The customary way.

Q. You never get into the bucket, do you?

A. Sometimes—if there is two men want to go down and feel like getting inside the bucket.

Q. As a matter of fact, how large is the bucket?

A. To the best of my estimation, about thirty inches across, in diameter.

Q. It is just like a large, galvanized iron or steel barrel, isn't it?

A. Yes.

MR. WAYNE: Will you mark these as defendant's exhibits?

(Two certain photographs were marked DEFENDANT'S EXHIBIT NO. 1 and 2.)

Q. Would you recognize a photograph of that bucket?

A. Yes.

Q. Showing you Defendant's Exhibit No. 1, is that it?

A. Yes, sir.

Q. That is this very bucket, is it not?

A. I think it is. There are three of them, but they are all the same.

MR. WAYNE: I offer Defendant's Exhibit No. 1 in evidence.

MR. PLUMMER: No objection. If you had shown those all to me in the first place we would probably have saved time, because I would probably admit all of them without objection.

MR. WAYNE: Q. Showing you Defendant's Exhibit No. 1, that is the top of the bucket in question, or one just like it, showing the cross head, is it not?

A. That is it. There is an attachment to this though, from what it was before.

Q. What is that?

A. This cable here.

Q. That has been put on extra.

A. Safety device, yes.

Q. It is an additional safety device?

A. Yes.

Q. At the time of the accident the bucket was provided with what is called a safety cross head, was it not?

A. Yes.

MR. WAYNE: I offer Defendant's Exhibit No. 2.

MR. PLUMMER: I have no objection to it, excepting, if Your Honor please, the witness says part of it wasn't on the bucket at that time.

MR. WAYNE: Well, we can't very well take it off the photograph.

MR. PLUMMER: Let us cross it then with a pencil so we will know what it is.

MR. WAYNE: It is the cable that runs up this way (indicating).

THE COURT: Just mark it with a cross so that the jury will know what it is.

MR. WAYNE: The cable which you refer to which wasn't on at the time

MR. PLUMMER: Make a series of crosses around the cable, about four of them.

(Counsel marked certain crosses on exhibit with pencil.)

MR. PLUMMER: No objection to that, with that modification.

MR. WAYNE: You just step over before the jury so that they can see this photograph.

Q. The safety cross head is a device to stop the bucket when it begins to fall, is it not?

A. Yes, sir, it is a device to stop the bucket, yes, if the cable is detached up here (indicating).

Q. The proposition is this, that this spring is compressed as it stands, is it not?

A. Yes.

Q. And the moment the cable breaks it releases this spring, and the spring flies downward?

A. Yes, sir.

Q. And when the spring flies downward it pulls the two levers running to the cross head?

A. Yes.

Q. And pulling them down, it shoots a sort of a dog into the guide?

A. Yes.

Q. And the faster the bucket is falling, the greater the weight in the bucket, the faster these dogs will hold, is it not?

A. Yes.

Q. They shoot out at either side into the guides?

A. Yes, sir.

Q. And the bucket was provided with this fixed safety cross head at the time of this accident?

A. It was.

Q. So that it couldn't fall in case the cable broke?

A. No.

Q. It would be caught on the guides?

A. Yes.

Q. How deep was this shaft at the time Witkowski was killed?

A. Around three hundred feet, more or less.

Q. You are just estimating that, are you?

A. Yes.

MR. PLUMMER: That is admitted in the pleadings, if Your Honor please, that it was three hundred feet.

MR. WAYNE: Q. As a matter of fact, you don't know whether it was 275 or 300?

A. Well, no, not exactly.

Q. When you men got on there you descended at the usual rate of speed for about thirty feet, you say?

A. When we started, we started with the usual gait, but as we got down about thirty feet I passed the remark that we were going quite fast.

Q. How fast was it usual and customary to lower the bucket?

A. Well, it was customary—we could have stopped the bucket if we could have got the bell cord and give the signal.

Q. That isn't exactly the question, Mr. Moran.

MR. PLUMMER: He has answered this. He says it is customary to go at the speed that he can catch the bell cord.

MR. WAYNE: He hasn't answered it.

MR. PLUMMER: I say he has.

THE COURT: No, Mr. Plummer, you shouldn't interfere. Counsel was simply saying that the witness didn't quite answer the question.

MR. WAYNE: You made no stop in going from the collar of the shaft to the bottom, did you?

A. We made one stop.

Q. I don't mean this particular night, but usually?

A. Usually?

Q. Yes.

A. Well, if we needed the lights lowered or fixed our bulk head overhead.

Q. On other occasions Mr. Moran, how fast would the hoist man lower the bucket with men in it or on it?

THE COURT: You mean how many feet per second?

Q. Yes.

A. Probably about somewheres around eight or ten feet per second. That is about as close as my estimation.

Q. About how long would it take to get to the bottom of the shaft?

A. Three hundred feet?

Q. Yes.



A. That is, in ordinary times?

Q. Yes, in ordinary times.

A. That three hundred feet would be made, we would make it in probably three-quarters of a minute.

Q. You had a rule upon the question in the Interstate, did you not?

A. I have read them, yes.

Q. And the rule was that the bucket should not be lowered or raised faster than six miles per hour?

A. Six miles per hour?

Q. Wasn't that the rule?

A. I don't know. I never read that.

(A certain photograph was marked DEFENDANT'S EXHIBIT NO. 3.)

Q. Showing you Defendant's Exhibit No. 3, that is a representation of the position which you men occupied on the bucket, that night, is it not?

A. Yes, sir.

MR. WAYNE: I offer this in evidence.

MR. PLUMMER: We have no objection to it.

(A certain paper was marked DEFENDANT'S EXHIBIT NO. 4.)

MR. WAYNE: Q. Defendant's Exhibit No. 4—you have seen the written rules of the Interstate mine, haven't you?

MR. PLUMMER: If the Court please, this isn't cross examination, I submit. He is trying to prove their case of contributory negligence by our witnesses, when we haven't asked the witness anything about it. We have only asked this witness as to what

happened that night, and about the speed it was going on that particular occasion. We haven't asked him anything about the speed on ordinary occasions or usual occasions. The law fixes that, and limits it to six hundred feet a minute. We are even willing to assume that they went too fast previous to this time. We haven't asked him about rules or customs as to speed previous to this occasion. I submit it isn't cross examination. If they want to make him their witness and we can cross examine him, we haven't any objection. This man is at this time a mucker boss in that same mine, and I want to show the reason why they shouldn't be allowed to cross examine him on matters that weren't brought out.

THE COURT: I think, Mr. Plummer, you did elicit from this witness the statement that when they first started the bucket went at the customary rate of speed. That, of course, would open the door as to what the customary rate of speed is, and thus far the examination has been confined to that.

MR. WAYNE: Q. You have seen those rules, have you not?

A. I have seen them, yes.

Q. Each one of the men signs the rules at the time he goes to work, does he not?

MR. PLUMMER: Wait a moment. Just a moment. We object to that as not cross examination.

THE COURT: Sustained.

MR. WAYNE: Q. You have noticed the rule as to the rate at which the bucket should be lowered or raised, have you not?

A. I did not notice it, didn't pay any attention to it.

Q. When you men went on shift that night you have said that the work of re-coiling the cable was not completed. Was it not usual and customary, and required by the rules of the company, when the hoist had not been used for some time, or when the cable had been re-coiled upon it, to make at least one round trip up and down the entire depth of the shaft, to test it out and see whether it was working properly or not?

MR. PLUMMER: We object to that as not proper cross examination, and for the further reason that the law of the State of Idaho provides that that shall be done, as an absolute duty of the master, which can not be delegated.

MR. WAYNE: No, the law doesn't require that.

THE COURT: I doubt whether this a proper cross examination, Mr. Wayne. The objection will be sustained upon that ground, not upon the other.

MR. WAYNE: Q. On this occasion the hoist, or the bucket, was simply brought up from the bottom of the shaft, and loaded immediately, and you men went down in it?

A. It was.

Q. Now after you had descended for the distance of thirty feet, and when you say the hoist got to going faster, your estimate of that speed is just a guess, is it not?

A. Just a guess.

Q. You don't know whether it is even approximately correct?

A. What do you mean by that?

Q. You don't mean to tell the jury that you are accurate in your estimate of its going twenty to twenty-five feet per second?

A. Not accurate, no.

Q. Do you know how fast a body, unobstructed, fall the first second.

A. I do not.

Q. When Witkouski jumped from the bucket he caught one of the dividers, did he not?

A. He tried to.

Q. Well, he caught it, and broke his hold afterwards, didn't he?

A. He made two attempts.

Q. And in either of those attempts, did he succeed in catching hold of the divider?

A. In the second attempt he held a little bit, very little.

Q. These dividers are of wood, are they not?

A. Ten by ten timbers.

Q. This was a three compartment shaft?

A. Yes.

Y. And the divider is a 10x10 timber, that divides the different compartments of the shaft?

A. Yes, sir.

MR. WAYNE: That is all.

RE-DIRECT EXAMINATION By

MR. PLUMMER:

Q. What work are you doing now, Mr. Moran?

A. I am mucker boss.

Q. For this same mine?

A. Yes, sir.

Q. How far, in your estimation, from the time the speed commenced to increase, after you had gone you say about thirty feet, from that point until the bucket was finally stopped, how far did the bucket go down the shaft?

A. From the time we noticed it running away until it stopped?

Q. Yes.

THE COURT: You mean absolutely stopped?

MR. PLUMMER: Well, under control, I will say, apparently.

A. About 150 feet.

Q. State what the fact is with reference to the speed after Witkouski jumped, whether it increased or decreased immediately after he got out?

A. It increased for a little bit.

Q. You have been asked about these safety clutches. Will you come over here, Mr. Moran. I would like to have the court see this also.

MR. WAYNE: I have another photograph just like that the court can see.

MR. PLUMMER: Very well.

MR. WAYNE: (Handing photograph to the Judge) These are duplicates.

MR. PLUMMER: Q. State what the fact is with reference to these safety clutches that you say grip the sides whenever the cable breaks or becomes detached from the cross head.



A. This spring here would come down and pull these levers down which press against the—

Q. Spread out?

A. Spread out against the—

Q. But will they spread out in that way so long as the cable is connected and there is resistance from above?

A. No, it will not.

MR. PLUMMER: That is all.

RE-CROSS EXAMINATION By

MR. WAYNE:

Q. It will if there is a catch in the cable that causes it to jerk, will it not, anything which will release that spring will throw the dogs into the guides?

A. That will depend on how close the bucket is to the top, to give the spring in the cable.

Q. Now, Mr. Moran, on this particular night how far did you say the bucket dropped after it began to go faster than usual?

A. To the best of my estimation about 150 feet.

Q. And in what manner was it stopped?

A. It stopped kind of gradually.

Q. Gradually and without any very perceptible jar?

A. No.

Q. And the three men who were in the bucket got out?

A. Just one man got off.

Q. Erickson?

A. Erickson got off.



Q. And the three men who remained in the bucket were uninjured?

A. We had a little minor scratches on us, not anything to hurt any.

Q. Nothing to hurt?

A. Not much.

MR. WAYNE: That is all.

RE-DIRECT EXAMINATION By

MR. PLUMMER:

Q. You have been asked about these rules, Mr. Moran, and this paper was handed you. Did you say whether or not you recognize those as the rules of the company?

A. I didn't read the whole thing.

Q. I will ask you about rule 28 in particular. State whether or not that was a rule in force in that mine at that time, as you understood it?

A. It was customary, yes.

Q. The word "mechanical department" here, what does that include, what men, I mean?

A. Mr. Hughes is master mechanic.

Q. And he is the head of that department?

A. I think he is.

MR. PLUMMER: I would like to offer in evidence, if Your Honor please, Rule 28 of this piece of paper that the witness has said he recognized as being the rules, and especially 28.

MR. WAYNE: There is no objection to the entire rules going in evidence.

MR. PLUMMER: You can put them in evidence

if you want to. I will put in mine, and you can put in yours.

THE COURT: Very well.

MR. PLUMMER: It is very short, and I will read it at this time, just to keep the connection in the testimony:

“It shall be the duty of the Mechanical Department to daily inspect the hoisting ropes and engines to see that the same are in a safe condition and in proper repair, and if at any time the rope or any part of the machinery shall appear to be out of order, to have the same repaired before continuing with the hoisting.”

That is all.

RE-CROSS EXAMINATION:

MR. WAYNE: I desire now to offer all of the shaft and hoisting rules, if Your Honor please.

MR. PLUMMER: We shall object to that at this time as not proper cross examination.

THE COURT: What ones are they?

MR. WAYNE: It begins with rule 26 and runs through rule 32.

MR. PLUMMER: There is no objection to the one with reference to speed, because I think that is cross examination under the ruling Your Honor made, but I don't think the rest of them are cross examination.

MR. WAYNE: That is rule 29.

THE COURT: The objection is overruled.

MR. WAYNE (reading): “SHAFT AND HOISTING RULES.

“26. Engineers in charge of hoisting engines at

the change of shift and at meal times shall first send down the cage empty to ascertain that the shaft is clear and safe before lowering men down in the shaft. These rules apply to raise also.

“27. Not more than four men at a time shall ride on each deck of the cage at the mine. Riding upon timber skip in any shaft, raise, winze or elsewhere is positively forbidden.

Rule 28 was just read by counsel for the plaintiff.

“29. Tools, steel, drills, timber and other material must not be lowered or hoisted except when placed inside cage or other conveyance and made safe by fastening. When men are hoisted the cage or other conveyance must commence to slow down within one hundred feet of the sheaves.”

Q. What are the sheaves?

A. The sheave wheels.

Q. The wheels on which the cable runs?

A. Yes.

MR. WAYNE (continuing reading): “Men must not be lowered or hoisted at a speed greater than six miles per hour, and when the cage on which men are being lowered approaches a station where chairs are in use, the speed of the cage must be materially lessened.”

“30. No employee must leave the shaft at any station, without first seeing that the bar is properly placed in position, so as to prevent anyone walking into the shaft opening.

“31. Cage men must, immediately after the cage

is hoisted, remove the chairs and see that everything is clear for the cage to pass.

“32. No one shall pull the electric signals or bell rope but the cagers unless by express permission of the Foreman.”

Q. What was the custom in regard to inspecting this hoist?

MR. PLUMMER: I think I shall object to that as not cross examination. I said nothing about that.

MR. WAYNE: He has brought out the rule upon the subject on his examination.

THE COURT: The objection is sustained, as not being cross examination.

MR. WAYNE: Q. Hughes was the master mechanic at this time, was he not?

A. He was.

Q. And he had one assistant, did he not?

A. I think he had.

Q. Elmer Fenstrom?

A. Yes.

Q. Isn't it a fact that either Fenstrom or Hughes made daily inspections of that hoist?

MR. PLUMMER: We object to that unless he knows that they made daily inspections.

MR. WAYNE: Well, I assume that the witness won't testify to anything he doesn't know.

A. I do not know.

Q. Have you ever seen either one of them there inspecting it?

A. Not to my knowledge.

Q. You are usually working at the bottom of the shaft?

A. Yes, sir.

MR. WAYNE: That is all.

RE-DIRECT EXAMINATION by

MR. PLUMMER:

Q. I would like to have you make one question clear, Mr. Moran, that you answered on cross examination. You were asked the question as to whether or not Mr. Witkouski gave orders to the hoist man, and whether or not the hoist man accepted and obeyed those orders. I want you to state now what particular orders you had reference to.

MR. WAYNE: I think that was made plain.

MR. PLUMMER: The court suggested that I could make it plain on re-direct.

THE COURT: Yes.

A. The particular orders on that?

THE COURT: That is, if there were any particular orders.

A. Why, giving signals when to hoist and lower the bucket, and in case, when we were in a hurry, when we wanted to blast, or something like that, he would send him after powder, in order to save time.

Q. Is that all?

A. That is about all.

MR. PLUMMER: That is all.

RE-CROSS EXAMINATION by

MR. WAYNE:

Q. He used to send him on errands any place in the mine, didn't he?

A. As to that I don't know. He did not send him off the level.

Q. But Egbert took his orders from Witkouski?

MR. PLUMMER: We object to that as being already covered; he asked the question before.

THE COURT: The difficulty about it is that you asked him for some particular orders, and the question is whether those were all of the orders.

MR. PLUMMER: He said those were all he knew of.

THE COURT: He said about all. Did Egbert take orders from anyone except Witkouski?

A. He took orders from the master mechanic, according to his hoist, I suppose, which everyone does, hoisting.

THE COURT: You may proceed.

MR. WAYNE: Q. As a matter of fact, just before you went down in the bucket on this particular night, Witkouski attempted to send Egbert for some fuse didn't he?

A. On this particular night?

Q. Yes.

A. Not that I know of.

Q. Isn't it a fact that he told him to go to some portion of the mine, naming it, and get some fuse, and that Egbert told him there would be no one to run the hoist if he did, or words to that effect?

A. I don't remember that.

Q. You mentioned in your direct examination something about working for a bonus. You men were working there for day's pay and an additional



bonus, depending on the amount of work you did, the number of feet you sunk in a given month?

A. Yes, sir.

Q. And you were attempting to do the work, for that reason, as fast as possible?

A. Save as much time as we could.

Q. And Witkouski, it was his habit to rush the work as much as possible, was it not?

MR. PLUMMER: That isn't cross examination, I submit, if Your Honor please.

THE COURT: Overruled.

(Last question read.)

A. Yes, to do as much as we could.

MR. WAYNE: That is all.

RE-DIRECT EXAMINATION by

MR. PLUMMER:

Q. What was done with the bucket when you first went down on shift, that is, I mean where was the bucket when you first went on?

A. At the bottom of the shaft.

Q. What was done with it before you folks got into it?

A. Hoisted it to the collar, hoisted 300 feet, or wherever it was; I don't exactly remember.

MR. PLUMMER: That is all.

MR. WAYNE: That is all.

HERBERT ERICKSON, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. PLUMMER:

Q. State your name?

A. Herbert Erickson.

Q. Where do you reside, Mr. Erickson?

A. Interstate.

Q. Who are you working for?

A. Interstate Mining Company, Interstate-Callahan.

Q. You are working for them now?

A. Yes, sir.

Q. In what capacity?

A. Stope boss.

Q. Were you working for them at the time Mr. Witkouski was killed?

A. Yes, I was working in the shaft.

Q. Who with?

A. With Witkouski and Ed Moran and Charlie—

Q. Ed Moran is the man who just left the stand?

A. Yes.

Q. Did you get on the bucket with Moran and Witkouski at the time it was lowered, when he was killed?

A. Yes.

Q. And how were you all standing on the bucket?

A. We was standing facing each other on each side.

Q. Where were you standing, with reference to the rim of the bucket?

A. Standing on the rim of the bucket.

Q. What did you notice, if anything, with refer-

ence to how the bucket went down that particular time? Just describe that in your own way.

A. Well, it did not start off unusual. After we got down a ways it started to speed up, and Ed Moran made a remark that we were going unusually fast, and Charlie said there was something wrong.

Q. Who do you mean by Charlie?

A. Charlie Witkowski.

Q. All right. And then what is the fact in reference to the speed at that time, either getting faster or slower?

A. Well, it kept on getting more faster.

Q. And how far did it drop before it was finally under control?

A. I should judge about 150 feet.

Q. How much of that 150 feet had it gone down before Witkowski made a grab to save himself?

A. I couldn't say.

Q. Just give your estimate about it.

A. I don't know where he was when he grabbed or jumped, or anything else.

Q. You didn't see him make the grab?

A. No, I didn't.

Q. What was you doing, the reason you didn't see him?

A. Well, I was standing on the same side as him, and I was facing the other way, the same as he was. I couldn't see him, but I could see the opposite party.

Q. What did the momentum of the bucket, what effect did that have on your hat and the light on your hat?

MR. WAYNE: That is leading, if Your Honor please.

MR. PLUMMER: That isn't leading.

THE COURT: Overruled. Answer the question.

A. It raised the hats off of our heads.

Q. How much do those carbide lamps weigh, how heavy are they, when they are filled with whatever material they are burning?

A. I couldn't say for sure.

Q. Just an estimate. I don't care about the exact ounces?

A. Four or five ounces, I guess.

Q. How did the situation appear to you, as to whether or not there was any threatened danger to you?

MR. WAYNE: I want to save the same objections to this line of testimony that I did to the testimony of the other witness.

THE COURT: Yes. It may be received under the same objection.

MR. PLUMMER: Q. At the time Witkouski jumped.

A. Well, I thought we was going to the bottom.

Q. State how it appeared to you. You say you would go to the bottom. Of course you would go to the bottom no matter how fast you were going. But how did it appear to you, with reference to your being in imminent danger of being injured or killed? What did you think about it?

A. Well, I thought at first the best way to get out would be to jump, and then I changed my mind and

gripped on the chain and looked down, and saw the light coming up pretty fast, and I says, "I guess it is off", and that is all.

Q. What did you mean by that?

A. I thought we would strike bottom and get smashed up.

Q. When Witkouski got off, jumped off, about how fast was the car going down at that time, that is, the bucket going down at that time?

A. I don't know when he jumped.

Q. That's right. You don't know when he jumped. This gang that was with you consisted of Mr. Witkouski, yourself, Mr. Moran, and who else?

A. Aleck Davey.

Q. Do you know where Aleck Davey is?

A. He was over at Thompson Falls, Montana, the last I heard of him.

Q. You were all sinking this shaft?

MR. PLUMMER: I think that is admitted.

MR. WAYNE: No.

MR. PLUMMER: Q. You were all sinking this shaft, were you?

A. Yes.

Q. That is the work you were doing, this crew?

A. Yes.

Q. What did Witkouski have to do with the hoist, if anything, and the hoist man?

A. Nothing that I know of, only I think he could have fired him.

Q. I didn't ask you about firing him. I am asking you what he had to do with him, with reference

to what orders he gave him, and with reference to what did he give orders? What orders did he give Egbert?

A. He gave him orders where he wanted to go up or down.

Q. Was that all?

A. That is all, as far as I know.

MR. PLUMMER: Take the witness.

CROSS EXAMINATION by

MR. WAYNE:

Q. As a matter of fact, Witkouski was the boss of that crew, was he not?

A. Yes.

Q. And the hoist man was a part of the crew?

MR. PLUMMER: Just a moment. We object to that as calling for a conclusion of the witness.

THE COURT: Overruled.

Q. Isn't that the fact, Mr. Erickson?

A. Yes.

Q. And you, all of you, including the hoist man, took your orders from Witkouski, didn't you?

A. Yes.

Q. And Witkouski gave orders to the hoist man not only when he wanted to be lowered or raised, but he gave him other orders, as to how to do his work in and about the mine, didn't he?

A. I don't know.

Q. Have you never seen Witkouski or heard him direct Egbert to go to other portions of the mine and get fuse and powder or the like?

A. No, I never heard him tell him.



Q. You don't know whether he used to give such orders as that or not? You think that Witkouski had the power to discharge Egbert if he was not doing his work satisfactorily?

MR. PLUMMER: Wait. Wait. Wait. We object to that as calling for a conclusion of the witness as to what he thinks about the power of an officer, as not competent.

MR. WAYNE: It is proper cross examination. He went into it on direct examination.

THE COURT: Well, he has already answered it, hasn't he? He said he thought he had power to fire him. I suppose the jury will know what he means by that.

MR. WAYNE: That was on direct examination.

THE COURT: Very well.

MR. WAYNE: Q. Isn't it a fact that just a short time prior to this accident you yourself heard Witkouski threaten to fire Joe Egbert for not raising or lowering him fast enough in that shaft?

MR. PLUMMER: Wait. Wait. We object to that as not cross examination.

THE COURT: Overruled.

MR. PLUMMER: An exception.

MR. WAYNE: Q. Isn't that a fact, Mr. Erickson?

A. Yes.

Q. Now, as a matter of fact, Witkouski was rushing this work, wasn't he?

A. Yes.

Q. And the reason he was rushing it was that you

men, including Witkouski, got a bonus for all work over a certain number of feet that you did in any particular month?

A. Yes.

Q. And isn't it a fact that during all of this time Witkouski was constantly what you men call hammering Egbert to do the work fast of hoisting up and down, isn't that the fact?

A. I never heard him direct him that way.

Q. You didn't?

A. No.

Q. Never at any time? How deep was this shaft at that time?

A. About 300 feet.

Q. You had been working there since they started to sink it, had you not?

A. Yes.

Q. And during that time had you ever descended that shaft at the rate of 600 feet per minute?

A. No, I don't think so.

Q. Let me aid you in that. Had you ever gone from the collar to the bottom of that shaft in as short a length of time as one-half a minute?

A. No.

Q. Do you know what the sensation would be, and what the effect on your caps and lights would be, if you did descend in that shaft as fast as 600 feet per minute?

MR. PLUMMER: I object to that as not cross examination. I haven't asked him about the speed per minute. He said he didn't know when the man got off the bucket, he couldn't tell.

THE COURT: Sustained.

MR. WAYNE: Q. Do you know how fast this bucket was descending at the time Witkowski jumped?

A. No, I don't.

Q. Do you know whether it was going down faster than 600 feet per minute?

MR. PLUMMER: We object to that because witness says he hasn't any idea, didn't see Witkowski jump.

THE COURT: Sustained.

MR. WAYNE: Q. Witkowski succeeded in catching hold of the divider as he jumped, did he not?

A. I don't know.

Q. You don't know whether he did or not?

A. No.

Q. None of the other men jumped, did they?

A. No.

Q. When the hoist man stopped the bucket he stopped it gradually, did he not?

A. Yes.

Q. And you men were not jolted, were you?

A. No.

Q. Who ordered the men on the bucket the night of this accident?

A. Nobody ordered us on.

Q. It was customary for you to get on?

A. Yes.

Q. Was there anything on the bucket in addition to the four men?

A. There was five lagging in the bucket.

Q. Do you remember at that time of Witkouski telling Joe Egbert to go and get him some powder or fuse?

A. He started to tell him something, going down, but he never finished what he was going to tell him.

MR. WAYNE: That is all.

MR. PLUMMER: Just one question.

RE-DIRECT EXAMINATION by

MR. PLUMMER:

Q. Do you know whether or not Witkouski had the power to discharge Egbert, or are you just guessing at it?

A. No. I am pretty near sure he could fire him.

Q. You know it pretty near sure?

A. Yes.

Q. How do you know it?

MR. WAYNE: I object to that, if the Court please.

MR. PLUMMER: If a man says he knows a thing I have a right to go into it.

THE COURT: Very well. Objection overruled.

MR. PLUMMER: Q. How do you know it?

A. Well, if he didn't do his work he could fire him.

Q. How do you know he could?

A. Well, it stands to reason he could.

Q. It just stands to reason?

MR. PLUMMER: That is all.

RE-CROSS EXAMINATION by

MR. WAYNE:

Q. That is the same way you knew he could fire you yourself, isn't it?

MR. PLUMMER: Just a minute. A man don't fire himself. He either quits—

THE COURT: No. He says that is the same way he knew he could fire himself, the witness.

MR. WAYNE: Q. Is it?

A. Yes.

THE COURT: Did you recognize the right of Mr. Witkouski to discharge or fire you, as you put it?

A. Yes.

MR. WAYNE: That is all.

RE-DIRECT EXAMINATION by

MR. PLUMMER:

Q. It that the only reason you think he could fire Egbert?

A. No.

Q. It isn't?

A. No.

Q. Who hires Egbert?

A. McDonald.

Q. Who is McDonald?

A. The foreman.

Q. General foreman, is he?

A. Day foreman, yes.

MR. PLUMMER: That is all.

MR. WAYNE: That is all.

THE COURT: Gentlemen of the jury, I am going to excuse you until two o'clock, and during this intermission of the court, as well as any other that may occur during the course of this trial, be very careful to keep yourselves away from witnesses and other parties interested, and also avoid overhearing any discussion of this case, or any matter connected with

it, and refrain from discussing it even among yourselves until it is finally submitted to you. Remember the hour, two o'clock. You may be excused.

Accordingly an adjournment was taken until 2 p.m., Friday, Nov. 24, 1916.

*2 p.m., Friday, Nov. 24, 1916.*

EDWARD P. MORAN, a witness heretofore duly sworn, upon being recalled upon behalf of plaintiff, testified as follows:

DIRECT EXAMINATION by

MR. PLUMMER:

Q. Regarding your testimony this morning with reference to Mr. Witkouski at one time using this hoist, just state to what extent he used it at that time.

A. At that time I was down at the bottom, and I wanted to come up for something and Charlie, he was up above, making primers, and I rung the cage up.

Q. What do you mean by rung it up?

A. And Charlie hoist me up, and when I got up on top I see he hoist me up, and I asked him where Egbert was.

Q. Just state what happened when you got up there.

MR. WAYNE: I object as immaterial.

THE COURT: Sustained, as to what he said.

MR. PLUMMER: Q. What did he say about powder, about Mr. Egbert. That bore out that Mr. Witkouski had sent Egbert for powder.



THE COURT: You mean what he said to Mr. Egbert?

MR. PLUMMER: No. What Mr. Witkouski said to the witness about Egbert going for powder.

MR. WAYNE: That is also hearsay.

THE COURT: Objection sustained.

MR. PLUMMER: Q. You testified this morning about some occurrence when you said Mr. Witkouski had sent Egbert for powder. Did you hear him send him?

A. I did not.

Q. Do you know of your own knowledge whether or not he ever did send him?

A. That I couldn't say.

Q. How long was it before the accident occurred that he hoisted you up this hoist that time?

A. About a month.

Q. Did you ever know him to use this hoist himself any other time, this same hoist?

A. I don't remember it.

Q. This work you were doing there at the bottom of the shaft, I believe you said you was sinking a shaft, were you?

A. Yes, sir.

Q. What is the fact with reference to whether or not you, including Witkouski and the other men, were all working together doing that work?

A. Yes, sir.

Q. State whether or not you were doing the same kind of work?

A. We were.

Q. After the accident happened, and after Mr. Witkouski had been killed, when you got on top,—did you come up on top immediately?

A. I did, after going to the bottom.

Q. And what appeared to be the condition of mind around there among your gang, including Mr. Egbert, as to whether or not they appeared to be excited over the accident?

MR. WAYNE: I object to that as immaterial.

MR. PLUMMER: If the Court please, I want to show statements made under excitement at that time, as part of the *res gestae*.

MR. WAYNE: And not binding upon the defendant.

THE COURT: Sustained.

MR. PLUMMER: Does the Court mean that we will be allowed to show what was said there at the time, as to the cause of the accident?

THE COURT: I see no reason for permitting that, unless it was by Mr. Witkouski.

MR. PLUMMER: No. I mean by Mr. Egbert himself, running the hoist, under excitement, at the time or near the time,—it would be entitled to credit as being a statement made under excitement, and immediately after the accident happened, when there was no chance to state anything but the truth, and no reason for stating anything but the truth.

MR. WAYNE: It isn't what anyone said. It is the actual fact, if Your Honor please, as to what caused the accident. He can't bind this defendant by declarations made by people there at the time.

MR. PLUMMER: I don't know what Your Honor's rulings have been on that subject. I do know that in our state, statements made under those conditions, even though a few minutes may elapse between the actual occurrence of the accident and the statement made; it is considered to be practically all the same transaction, and it is admitted for what it is worth, as a circumstance indicating what did cause the accident, and upon the theory that it is presumed that at that particular time, and under those circumstances, a person would naturally state what the facts were; and it is within the discretion of the court, I admit, but the courts have always held,—our courts have allowed it there, even when a number of minutes have expired, but as to whether or not it is entitled to credit is for the jury to say. Naturally a statement made, stating the truth, under the circumstances, it seems to me it is a part of the *res gestae*, and ought to be allowed.

MR. WAYNE: If Your Honor please, the rule might be different if it was a declaration made by the party, by the defendant in a criminal case, for instance, or something of that sort, but these workmen might have expressed their opinion there at that time and their conjecture as to what caused the accident, if they know they should be brought here as witnesses, but their mere statement as to what they thought at that time is certainly not admissable.

MR. PLUMMER: May I make another suggestion? We expect to show that whatever was said was said before Mr. Egbert himself, who was oper-

ating the hoist and in a position to know what caused it. I may say further that in the case of Walters versus Spokane Railway Company, decided by the Supreme Court, where a declaration was made by a conductor, where a train had been derailed, and after the derailment had occurred and a man had been killed, nearly a year afterwards, the conductor made the remark in the presence of the people there, that it was a bad track, and that was offered in evidence and strenuously objected to at the trial, and admitted, however, by the court, and the supreme court affirmed it, and ruled specifically that it was admissible, as it happened so close to the accident that it was part of the *res gestae*, and the jury ought to have it to decide it for what it was worth. And numerous cases cited in support of it.

THE COURT: I am aware of the principle. I am not sure just how far I should recognize it in a case of this kind. The man Egbert is still alive and available,—he is a witness, is he not?

MR. PLUMMER: He is, but he is in the employ of the company.

THE COURT: Yes, but so is this gentleman, and the other gentleman who was upon the witness stand.

MR. PLUMMER: We have reason to believe that he is a hostile witness, if Your Honor please.

MR. WAYNE: If Your Honor please, that statement is entirely improper. As a matter of fact they brought him here as their witness. I haven't so much as talked to him. They have had Egbert in constant consultation, and I know it. They have had him up to their office—

MR. PLUMMER: We brought him here to prove one fact, and one only.

THE COURT: I think I shall sustain the objection for the present. I think, however, I shall permit you to furnish me the more recent authorities to which you refer. I think the principle is recognized generally only in case of necessity therefor. If the witness is here, if you subpoenaed him here, I am not so sure whether I ought to permit you to have the secondary testimony as to what occurred, but it may be that it will be admissible. I will give you an opportunity of furnishing the authority. You can recall this witness if I decide to change the ruling.

MR. PLUMMER: You may take the witness.

CROSS EXAMINATION by

MR. WAYNE:

Q. Mr. Moran, you had on other occasions heard Witkowski order Egbert to go to different places in the mine to get things for him, had you not?

MR. PLUMMER: We submit that isn't cross-examination, under the testimony just offered. He asked him about that before, and went into details and on redirect I asked him as to those particular times, and he said that was the only time, and I submit that has been gone over once.

THE COURT: The objection is overruled.

MR. WAYNE: Go ahead, Mr. Moran.

(Last question read.)

A. Not previous to the accident I hadn't. No, I haven't heard.



Q. Were you mistaken this morning when you said you had, on your cross examination?

MR. PLUMMER: We object to that on the ground the witness hasn't so testified.

MR. WAYNE: Yes, he did so testify.

MR. PLUMMER: No, he didn't.

THE COURT: I don't think he testified that he had on other occasions. He stated that he had on some occasions.

MR. PLUMMER: And he mentioned them.

THE COURT: These may be the cases to which he referred. The testimony was left in rather a general condition.

MR. WAYNE: Q. You talked to Mr. Plummer, didn't you, during the noon recess, Mr. Moran?

A. I have.

MR. WAYNE: That is all.

RE-DIRECT EXAMINATION by

MR. PLUMMER:

Q. Mr. Moran, when you went on shift, this particular shift we speak of, that this accident occurred upon, who was with you?

MR. WAYNE: I object to that as repetition. It was gone into fully.

MR. PLUMMER: I haven't asked him that yet.

THE COURT: I have understood him to answer that question two or three times, that he and the other two men and Witkouski were on that shift.

MR. PLUMMER: But I want to show who was with him going on to the shift.

MR. WAYNE: I object to that as immaterial.



THE COURT: Overruled.

MR. PLUMMER: O. Who was with you?

A. As near as I can judge, we were all together going on shift.

Q. Who were they?

A. Joe Egbert, Aleck Davy, Herb Erickson, and Charlie Witkowski and I.

Q. What was Egbert?

MR. WAYNE: I object to that.

THE COURT: That has been brought out several times, and is admitted in the pleadings isn't it?

MR. PLUMMER: I don't think so. It has been brought out that at the time of the powder proposition Egbert had charge then, the month before. I haven't shown that Egbert was the hoist man at the time of the accident.

THE COURT: That was shown this morning, wasn't it, and it is admitted, isn't it?

MR. WAYNE: Yes, it is admitted.

MR. PLUMMER: Q. At the time you all went on shift there, state whether or not you saw Mr. Egbert or anyone else inspect this hoist.

A. I did not.

MR. PLUMMER: Take the witness.

RE-CROSS EXAMINATION by

MR. WAYNE:

Q. You don't know though whether they did or not, do you?

A. I do not know. I didn't see them.

MR. WAYNE: I move that the answer be stricken out.

MR. PLUMMER: Wait a moment. Let me ask a question.

MR. WAYNE: I move that the answer be stricken out, for the reason that the witness simply shows a lack of knowledge.

THE COURT: The motion will be denied.

RE-DIRECT EXAMINATION by

MR. PLUMMER:

Q. How close were you to him all the time you were around the shaft, or around the hoist, before you went down the shaft?

THE COURT: To whom?

MR. PLUMMER: To Egbert.

A. Well, it varied.

Q. Give the court and jury some idea.

A. How much it varied?

Q. Could you see him all the time?

A. Yes.

MR. PLUMMER: That is all.

RE-CROSS EXAMINATION by

MR. WAYNE:

Q. You helped Witkouski and these other two men load the bucket with lagging, didn't you?

A. I did.

Q. Where did you get the lagging from?

A. Right close to the—within six or eight feet of the bucket.

Q. Which way from the hoist?

A. I don't understand what you mean.

Q. Well, when you would go to put the lagging in the bucket you would have your back turned to the hoist, wouldn't you?

A. Kind of side ways.

Q. You couldn't see Egbert then, could you?

A. We could if we would look sideways.

Q. And also the hoist would be between you and Egbert, wouldn't it?

A. It would.

Q. It would?

A. That is, after we were at the bucket—

Q. After you were at the bucket then you weren't where you could see him all the time, were you?

A. No.

MR. WAYNE: That is all.

MR. PLUMMER: That is all. Mr. Egbert.

JOE EGBERT, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. PLUMMER:

Q. State your name.

A. Joe Egbert.

Q. Where do you reside?

A. Interstate Mine, Wallace.

Q. That is this same mine in controversy here, is it?

A. Yes.

Q. Are you still working for that company?

A. Yes.

Q. You were subpoenaed here by us, and came in answer to that subpoena, didn't you?

A. Yes.

Q. You are the same Egbert that has been re-

ferred to here as having charge of the hoist at the time this accident occurred?

A. Yes, sir.

Q. Do you recall the accident?

A. Yes, sir.

Q. Do you recall anything about the bucket descending at some extraordinary speed on that occasion?

A. Yes, sir.

Q. What caused that to descend in that manner?

A. Well, the clutch was too loose.

Q. And, it being too loose, what did it do, how did it operate?

A. What caused it I couldn't say.

Q. That is, you couldn't say what caused it to be loose?

A. No. There are so many different possibilities.

Q. And it being loose, however, what did that cause the drum to do?

A. It worked faster than usual.

Q. Did you have any control over it for the first few seconds?

A. Not from the start.

Q. In lowering this hoist with men on it, as you were lowering it this particular day, you started out, did you, to lower it in the ordinary manner that you usually did?

A. In the ordinary manner.

Q. How was that done? How did you operate the hoist to do that?

A. Open the reverse and let her go down.

Q. What I want to get at is whether or not—ordinarily, I am speaking of now,—what held the bucket, or allowed the bucket to descend at a reasonably safe speed? How did the engine hold it, the way you usually did it?

THE COURT: What regulates the speed?

A. The reverse air.

MR. PLUMMER: Q. The reverse air?

A. It is how much air you let out.

Q. This was an air hoist, was it, compressed air?

A. Yes.

Q. And you would turn the air on or off, just as you wanted to lower the bucket?

A. Yes.

Q. And that forced the pressure against the piston head so as to hold it in reverse?

A. Yes, sir.

Q. And that is the way you started to do this time?

A. Yes, sir.

MR. PLUMMER: You may take the witness.

CROSS EXAMINATION by

MR. WAYNE:

Q. Mr. Egbert, you were working on Witkowski's shift?

A. Yes, sir.

Q. And he was your boss?

MR. PLUMMER: I object to that as not cross examination. I just asked him as to what happened on that occasion, and how he usually operated the hoist. I didn't ask him about vice principal or his authority, or anything of that kind.

MR. WAYNE: I have a right to show that, to show that he was a hoist man, and I have a right to inquire who the other men were on this shift, and their relative positions.

MR. PLUMMER: Not for the purpose of showing vice principal at all.

MR. WAYNE: Certainly when he testifies to the facts surrounding the accident I have a right to go into it. You can't put on a witness—

MR. PLUMMER: They are trying to prove now the question of vice principal, and I only asked him what happened on that occasion.

THE COURT: I think I will let him answer this question. I am not sure how far I should permit him to go, but this certainly wont hurt you. You have already shown this fact, haven't you?

MR. PLUMMER: I think probably I have shown that by other witnesses, but I didn't want to waive my point.

MR. WAYNE: Q. You were working under Witkouski, weren't you?

A. Yes.

Q. And he was your boss?

A. That was my opinion.

MR. PLUMMER: I move to strike the answer out.

THE COURT: Overruled.

MR. WAYNE: Q. How long had you been working on this hoist?

A. I worked at the old shaft. The hoist was transferred, the same hoist.



Q. Mr. Egbert, that hoist was brought down to the new shaft, as you call it, about the early part of March, 1916, was it not?

A. I believe so.

Q. Now, that hoist consists of a spool or drum, on which a cable is coiled, does it not? It has a spool or drum, on which the cable is coiled?

A. Yes, that's right.

Q. And on the end of the spool or drum there is what is called a band clutch, is there not?

A. Yes, sir.

Q. And that band clutch was at this time lined with asbestos, wasn't it?

A. Yes, it was lined with belting or asbestos, I am not sure which.

Q. The purpose of that clutch is to transmit the power of the engine to the drum, isn't it?

A. Yes, sir.

Q. By tightening on the drum it causes the drum to revolve one way or the other?

A. Yes.

Q. And in addition to that you have a brake, do you not?

A. Yes, sir.

Q. The clutch and the brake control the action of the hoist, do they not?

A. Yes, sir.

MR. WAYNE: Will you mark this please?

(Three certain photographs were marked as DEFENDANT'S EXHIBITS No. 5, 6, and 7.)

Q. Mr. Egbert, showing you Defendant's Exhibit

No. 5, that correctly illustrates the position of the man at the hoist, and shows the hoist, does it not?

A. Yes, sir. The reverse is transferred; the reverse was higher up.

Q. It was higher up?

A. Yes, sir.

Q. And by the reverse you mean the reverse lever?

A. Yes, sir, that is what we call it, reverse lever.

Q. That is the brake lever, is it not (indicating)?

A. Yes.

Q. Showing you Defendant's Exhibit No. 6, and directing your attention to the arrow, that shows the cam shaft, which is turned by pulling the clutch lever, does it not?

A. Yes, sir.

Q. And showing you Exhibit No. 7, that shows you the clutch as it is thrown in by the pulling of the clutch lever and the turning of the cam shaft?

A. Yes, sir.

Q. And the clutch band that you refer to is the band of spring steel, isn't it?

A. Yes, sir.

Q. Which extends almost entirely around the end of the drum, that is a fact, isn't it?

A. Yes, sir.

Q. And that is the part that you say was lined with either belting or asbestos?

A. Yes, sir.

Q. And as you pull the clutch lever it brings the two knuckles on the end of the band together, and tightens the clutch band on the drum?

A. Yes, sir.

Q. That is the action of it?

A. Yes, sir.

Q. And the entire control of the clutch was in that one lever which you operated with your right hand?

A. Yes, sir.

Q. And the brake lever you operated with your left hand?

A. The lever was operated, both with the right hand. The left hand was only for the air lever and the reverse lever.

Q. This was a hoist that was run by means of compressed air, wasn't it?

A. Yes, sir.

Q. And you operated the levers which controlled the air with your left hand?

A. Yes, sir.

Q. Do you know what caused the clutch to be loose on the day of the accident?

MR. PLUMMER: We object to that as not proper cross examination. I haven't asked him anything about the cause of it. I asked him what actually existed. I didn't attempt to prove by this witness, either as an expert or the man in charge of that hoist, what was the cause of it. I expect to show it by other witnesses.

MR. WAYNE: If the Court please, he can't put a witness on to testify to a condition, and then prevent me from cross examining him as to how that condition happened to exist.

MR. PLUMMER: I think we can.

THE COURT: I will permit you to ask him how he knew that the clutch didn't work well. That in all probability will lead to the same result. You certainly would have a right to go that far.

MR. PLUMMER: Yes. I have no objection to that question.

MR. WAYNE: Q. Mr. Egbert, what was the other shift doing when you went on work that night?

A. When we came on shift they was recoiling the cable.

Q. And what was the custom when the men were re-coiling the cable, as to whether or not they would loosen the clutch?

MR. PLUMMER: We object to any custom, if Your Honor please. It doesn't prove any fact here.

THE COURT: Well, I assume that counsel is getting at this question as to how he knows that the clutch didn't work well.

MR. PLUMMER: Well, I think he ought to ask him that then.

THE COURT: The objection is overruled. If I find that counsel is going outside of that ruling I will strike it out, and not permit him to go further with the interrogation.

MR. WAYNE: Q. What was the custom when they were re-coiling the cable, in regard to whether or not they would loosen the clutch?

A. They loosen the clutch on account of the cable easier off. If that was up on top, if the bucket and cable was down in, certain the weight of the bucket and cable was helping it out.

Q. But if you were trying to uncoil the cable off of the drum, without loosening the clutch, it would take quite a force of men to do it, would it not?

A. Pull pretty hard.

Q. But by loosening the clutch, it removed that friction from the end of the drum, and it could be pulled off readily?

A. Yes, sir.

Q. Now, Mr. Egbert, can you show me the screw which would be loosened to release the clutch? Just tell the jury what kind of a screw that was.

THE COURT: Let him show it to the jury on the picture here.

MR. WAYNE: I think I will have him mark that.

Q. Will you just put an X on that screw?

(Witness did so.)

Q. That is the screw which would be loosened to release the clutch, that you have marked with the X, at the top of the photograph, Exhibit 7?

A. Yes.

Q. Now just tell the jury how large a screw that was, and what kind of a screw.

A. If I am not mistaken, it was one inch.

THE COURT: An inch in diameter?

MR. WAYNE: Q. An inch through?

A. The bolt was—that is another bolt. That was changed. When I was on the hoist it was a six-cornered bolt here, and it is a four-cornered.

Q. Now, Mr. Egbert, do you mean to say that that bolt was one inch in diameter, one inch through?

A. The screw was that large, the diameter was

possibly an inch and a half, of that bolt there. I couldn't say for sure how big it was. I never measured it.

Q. The nut on the end of it, how large was that?

A. You mean that nut there (indicating)?

Q. Yes.

A. That was inch and a half, and I believe the bolt was one inch.

Q. And you would loosen it with a wrench, would you?

A. With a wrench or with a chisel.

Q. What was the condition of that screw or bolt after the accident?

A. I couldn't tell you. We went away.

Q. You went away?

A. Yes.

Q. Do you know whether or not it had been loosened?

A. Nobody say anything to me, you see.

Q. Who was the hoist man who preceded you?

A. Mr. Lytton.

Q. And he said nothing to you about it?

A. He reported nothing to me.

Q. And who is the pusher of the shift crew ahead of you?

A. Mr. Jacobson.

Q. Did he tell you anything about it?

A. No, sir.

Q. Now, the reason that the hoist descended rapidly was the fact that the clutch was loosened, was it not?



A. That is what it was.

Q. What gave you notice of the fact that it was going down too fast?

A. I saw the cable coiling very fast.

Q. And then you applied your brake?

A. Yes, sir.

Q. And did you have any trouble in stopping the hoist by means of the brake?

A. Well, I stopped it gradually. I was afraid to stop it quick.

Q. And you had no trouble in stopping it gradually?

A. I stopped it about 150 feet from the bottom.

Q. And the entire shaft was about 300 feet deep at that time?

A. I believe it was over 300,—64 or 66 sets.

Q. Will you tell the jury whether or not the clutch was in good condition at the time of this accident?

MR. PLUMMER: We object to that as not cross examination. I didn't ask him anything about the clutch, except the slipping of it. Good condition also calls for an opinion, and doesn't mean anything to the jury.

THE COURT: No. That goes directly to the question as to whether or not the clutch did hold, and why it didn't hold.

MR. PLUMMER: Good condition, he wouldn't know what he meant by that.

THE COURT: What do you mean by good condition?

MR. WAYNE: So far as its condition generally was concerned, aside from this looseness.

MR. PLUMMER: I haven't asked him anything about it. That isn't cross examination.

MR. WAYNE: You have asked him if it slipped, and I want to know why it slipped. I haven't asked him aside from the slipping of it.

THE COURT: He is really asking him now why it slipped. I think the question is rather general.

MR. WAYNE: Q. Mr. Egbert, will you tell the jury whether or not that clutch was in good working condition at the time of this accident?

MR. PLUMMER: I object to that. That is the very question the jury is to decide, and I think he ought to state the facts and let them decide.

A. My opinion was that it was in good condition.

Q. And what was the condition of the brake?

A. My opinion, it was O. K.

Q. You had no trouble with the brakes?

A. I never had trouble with the hoist.

Q. You had operated the hoist up at the other shaft, had you?

A. The same hoist.

Q. How much of a load was it pulling up there?

A. It was four or five times bigger haul.

Q. They were pulling a cage and a skip?

A. Yes, sir, and ore.

Q. Loaded with ore?

A. Yes, sir.

Q. What did the bucket have in it at the time of the accident?

MR. PLUMMER: I object to that as not cross examination. I didn't ask him anything about that.

THE COURT: Sustained.

MR. WAYNE: That is all.

RE-DIRECT EXAMINATION by

MR. PLUMMER:

Q. How long before this accident was it that you used this hoist up at the other shaft?

A. That was three weeks off.

Q. How long had you been using the hoist at this particular place where the accident occurred?

A. Pretty near two months, one or two days less.

Q. Then you had been using it two months since it was moved from the other shaft?

A. Yes, sir.

Q. It had been in use constantly, had it?

A. Yes, sir.

Q. You say, answering a question of Mr. Wayne, you made the remark that the hoist was in good condition. Do you mean by that, outside of this clutch?

A. It was my opinion it was in good condition.

Q. Did you consider the clutch in good condition?

A. In my opinion.

Q. When it was loose?

A. When it was loose we tighten it up.

Q. I mean before you tightened it up?

A. In my opinion it was all right.

Q. Even if it was loose?

A. It was loose and we fixed it up.

Q. But when it was loose, and before it was fixed up, did you consider it all right then?

A. Well, it was only the work of a couple of minutes to fix it.

Q. I didn't ask you that. When it was still loose—

MR. WAYNE: I object to that.

THE COURT: I think the opinion of the witness is clear, Mr. Plummer, that the clutch was in good condition with the exception that it wasn't tight. I think the jury must so understand it. No other construction could be put upon his testimony.

MR. PLUMMER: Q. Do you know what caused the clutch to get loose?

A. I have got two opinions about it.

Q. I asked you first as to whether or not you knew. You can answer that yes or no. Do you know what caused the clutch to get loose?

A. That is what I am trying to tell you.

Q. Answer that yes or no.

MR. WAYNE: If Your Honor please, I don't think he should cross examine his own witness.

MR. PLUMMER: I want him to answer my question, is all.

THE COURT: Do you know, Mr. Egbert, of your own knowledge, what caused this clutch to get loose? You say it was loose. Do you know why it got loose?

A. I heard two or three days after this—

THE COURT: That is what you heard?

A. Yes.

THE COURT: But you didn't see anyone loosen it?

A. No I didn't see nothing, and it was reported to me.

MR. PLUMMER: Q. You testified on cross examination about some custom of "they." You used the word "they" loosened the clutch to uncoil it, or something about coiling it, you was asked about a custom. On this particular occasion did you see anybody loosen it at all?

A. No, sir.

Q. And another feature that I didn't go into on my original examination, and I would like to now. After the accident occurred, and you finally got the hoist stopped, did you raise the bucket again to the surface, after that?

A. No, sir; I let it down to the bottom.

Q. You let it down to the bottom?

A. I got two bells.

Q. You lowered it down to the bottom?

A. Yes, sir.

Q. And then you raised it up to the top?

A. Yes, sir.

Q. And then what did you do, if anything, about tightening that clutch?

A. Well, I took a wrench and tightened it.

Q. Then it worked all right, did it?

A. Well, we went home after that. I made only two trips from below up. I couldn't tell how it worked afterwards. I never worked on that hoist no more.

Q. Before this accident occurred, did you ever know of this clutch slipping in the same manner as it slipped this day, before?

A. Not letting down, only hoisting up, once when

loaded, and once when started to hoist it, went back.

Q. How long was that before the accident.

A. It was about one month before.

Q. Both occurrences?

A. Pretty close.

Q. Those were the only two times you knew it to slip?

A. Yes.

Q. I will ask you, Mr. Egbert, to state whether or not, when you went to work on this shift, you took the hoist in exactly the same condition it was when it was left by the other, previous shift?

A. We came on shift—

Q. Please answer my question. You relieved Mr. Lytton, did you?

A. Yes, sir.

Q. And did he turn it over to you?

A. Yes, sir.

Q. You took it just as he left it, did you?

A. Yes, sir.

MR. PLUMMER: That is all.

RE-CROSS EXAMINATION by

MR. WAYNE:

Q. Mr. Egbert, all it needed then to make the clutch work perfectly was to tighten that one nut?

A. Yes, sir.

Q. Do you know whether or not that nut had been loosened by the preceding crew, so as to uncoil the cable?

MR. PLUMMER: Just a moment. He has testified that he didn't see anybody at all loosen it, and he wasn't there.



MR. WAYNE: To see things isn't the only way a man can know.

MR. PLUMMER: He can know by hearsay.

The COURT: The objection is sustained.

MR. WAYNE: Q. Did you tighten that nut before raising the men from the bottom?

A. Not the first time,—the second time.

Q. And even without tightening the nut you had no trouble in raising them from the bottom of the shaft?

A. Not the first time. The second time I have five men in, and I tried to raise it up and I couldn't raise it.

Q. Mr. Egbert, you spoke of the clutch slipping before. That is quite usual when you have a load on, is it not, in one of these hoists?

MR. PLUMMER: We object to that. They can't establish a degree of reasonable care by showing that they used a defective hoist at other times.

THE COURT: Overruled.

MR. WAYNE: Go ahead, Mr. Egbert.

THE COURT: That is, I assume that counsel is trying to show that it doesn't indicate a defect, that a clutch slips. Ordinarily that is one of the purposes of a clutch, isn't it, to have it so that it would slip?

MR. PLUMMER: It wouldn't clutch if it slipped, I mean slipped enough so as to let the whole cable down into the shaft.

THE COURT: That is one of the purposes of the ordinary clutch, isn't it?

MR. PLUMMER: I think not, if Your Honor please. My understanding of a clutch—

MR. WAYNE: I object to that.

THE COURT: I think his mechanical experience is different from mine.

MR. PLUMMER: My idea is that by reason of the friction which is forced against the drum, it turns the drum with the part it is attached to, and the very object of a clutch is to force it so that it will turn the other, and not slip. It may slip an inch or two, but it wouldn't be perceptible. If the clutch slips, then there is no power being transmitted.

THE COURT: That is true, but in connecting up the two parts of the mechanism the purpose of the clutch is to permit a slipping for the time being, so as not to jar and put a strain upon the transmission.

MR. PLUMMER: Until it takes hold, sure.

THE COURT: That is ordinarily true in automobiles, and you may apply the clutch in such a way that it won't slip at all, or apply it so that it will slip in part, and simply act as a brake. That is true sometimes. I am saying that only to indicate why I rule upon this question as I do. I assume that counsel is trying to bring out the fact that it doesn't necessarily mean that a clutch is defective because it slips. Whether that is true of this clutch or not I don't know, and will permit the witness to advise us upon the point.

MR. WAYNE: Mr. Egbert, it is not unusual for these clutches to slip some, is it?

A. It happens once in a while.

Q. On any hoist?

A. Yes, sir.

Q. And as a matter of fact, in lowering down a load you loosen the clutch somewhat with the clutch lever, do you not—you don't keep it tight?

A. You loosen it wide open.

Q. And control the lowering of the men—

A. Not lowering the men. In case you lower a bucket you open the clutch wide open and let it drop.

Q. And when you are lowering men do you keep it perfectly tight?

A. Perfectly tight.

Q. And it is not unusual, even when you have it tight, for it to slip a short distance, is it?

A. Well, if it is overloaded or anything like that.

Q. Now the only thing that is necessary to make that clutch act perfectly after the accident was to tighten that screw?

A. That is all.

THE COURT: He has answered that.

MR. WAYNE: Q. And the screw, from what you saw there, had been loosened by someone?

A. I couldn't tell. It was loosened very little. I couldn't tell from seeing it.

Q. I may have asked you this before, but at the time you went on shift that night the work of re-coiling the cable had not been completed, had it?

A. No. We put on three or four coils.

Q. How did you find out that the work hadn't been completed?

A. Well, the other crew was at work doing it.

Q. They were at work doing it?

A. Yes, sir.

MR. WAYNE: That is all.

RE-DIRECT EXAMINATION by

MR. PLUMMER:

Q. Did you ever know before of a clutch to slip as much as this clutch slipped on the occasion when this man was killed, so as to drop that down a hundred and fifty feet?

MR. WAYNE: Just a moment. He didn't say it was 150 feet. He said to within 150 feet of the bottom.

THE COURT: He may ask him if he ever knew of one to drop this far.

A. Many times.

MR. PLUMMER: Q. Where?

A. Three years ago, in the Standard mine.

Q. Did you ever, in this mine?

A. Not in this mine.

Q. Nor with this hoist?

A. Not with this hoist.

Q. You spoke something about when you raised the men up, you started to raise the same men up that you had lowered down?

A. Yes, sir.

Q. Including the man who was killed?

A. Yes.

Q. Why couldn't you do it?

A. The clutch was not tight.

Q. And before you could raise it up at all you had to let some of the men get off and lighten the load?

A. I tried to raise it, and can not do it, and I take the chisel and tighten it up.

Q. And then you was able to raise it?

A. Yes, sir.

MR. PLUMMER: That is all.

MR. WAYNE: That is all.

AL RENGQUIST, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. PLUMMER:

Q. You may state your name.

A. Al Rengquist.

Q. Where do you live?

A. Butte, Montana.

Q. Were you working for the defendant company at the time the deceased here was killed?

A. I was.

Q. In what capacity?

A. Night foreman.

Q. I wish you would describe as briefly as you can the different grades of bosses there, or foremen. What does the night foreman have charge of?

A. The whole mine at night.

Q. And the day foreman has charge of the whole mine in the day time?

A. Has charge of it all the time.

Q. Who was under you with reference to this particular work?

A. The stope bosses and pushers and all the rest of the men on the night shift.

Q. What is a pusher?

A. A man working in a shaft—he had men in the shaft.

Q. Working with the rest of the men?

A. Yes.

Q. What does the pusher do,—push the men on the work?

A. He sees that the work goes along and looks after things there.

Q. What is the fact with reference to that time when Mr. Witkouski was killed, whether or not under your direction and the direction of the day foreman, the work was being crowded under the superintendent's direction, pushed along as fast as you could?

MR. WAYNE: We object to that as immaterial.

MR. PLUMMER: They tried to show that our man was crowding the work, and we want to show that they were crowding him too.

MR. WAYNE: There is no charge of negligence based upon any such fact as that. I object to it as immaterial.

MR. PLUMMER: The charge of contributory negligence is general, and I don't know what they are going to try to prove.

THE COURT: The objection is sustained.

MR. PLUMMER: Q. These hoists that are in question here, doing the hoisting in that mine, including the hoist in question here, who has charge of those hoists, as far as keeping the hoists in repair are concerned?

A. The master mechanic and the engineers.

Q. What do you mean by the word "engineers"—the hoist men?



A. The hoist men, yes.

Q. State whether or not Witkowski had anything to do with that feature of it?

A. The only knowledge I had was that the engineer and master mechanic was the ones that looks after the hoist.

Q. What was Mr. Witkowski's exclusive duties?

A. Pushing the shaft, working in the shaft.

MR. PLUMMER: You may cross examine.

CROSS EXAMINATION by

MR. WAYNE:

Q. How many shifts were working in this shaft at that time, Mr. Rengquist?

A. Three eight hour shifts.

Q. And of what did each of those shifts consist?

A. There was an engineer, pusher, and three men.

Q. And they were all under the general direction, so far as doing their work was concerned, of the pusher, weren't they?

A. Well, yes, they were under the pusher's orders.

Q. The pusher told the hoist man when to lower and when to raise, didn't he?

A. Yes, by a bell signal.

Q. And the stuff that they were lowering was drills and machines and lagging, and material such as that?

A. Yes.

Q. And the stuff that they were bringing up from the shaft was ore and waste and the like of that?

A. Muck, principally, waste.

Q. Principally muck at that time?

A. Yes.

Q. And the reason that it was principally muck was that this was a shaft which was in process of being sunk, that is the fact, isn't it?

A. Yes.

Q. And it had not yet been used as a working shaft?

A. No.

Q. Now, when you say that the making of repairs on the shaft was in the hands of the master mechanic or the hoist man, you mean the repairing of any defects, do you not?

A. In the hoist, yes.

Q. If a bolt was loose or a nut was loose, it was not the business of the master mechanic to come and tighten that, was it?

A. Well, the engineer was supposed to do that.

Q. He was supposed to look out for little things of that sort?

A. He could tighten up a nut all right enough.

Q. It was only the business of the master mechanic to repair the hoist when there was some part broken, isn't that what you mean to say?

A. Yes, he would repair broken parts and change parts in it, whatever was needed, I think.

Q. What system of inspecting did they have up there at that time, of the machinery?

A. Well, if the hoist, if anything went wrong they usually notified the master mechanic or McDonald.

Q. Who would notify him?

A. The engineer.

Q. And isn't it a fact that the master mechanic or his assistant inspected the hoists and other machinery, the pumps, about once every twenty-four hours?

MR. PLUMMER: If your Honor please, I submit that isn't cross examination, as to what was done. I asked this witness simply the offices of the different employes, as to what they were required to do, as between Mr. Witkouski and the engineer and the master mechanic.

THE COURT: Sustained.

MR. WAYNE: That is all.

RE-DIRECT EXAMINATION by

MR. PLUMMER:

Q. Who had the hiring and discharging of the engineer?

A. Well, McDonald, he hired the engineers, and if he wanted a man on the hoist he put him on the hoist.

Q. Who is McDonald?

A. Foreman McDonald.

Q. General foreman?

A. Yes, sir.

Q. Could Witkouski discharge the engineer?

A. He could recommend his discharge.

Q. In case he should recommend his discharge, who would he recommend it to?

A. Either McDonald or myself.

Q. State whether or not it was within your dis-

cretion either to discharge him or put him to work in some other place?

A. Well, if he couldn't fill his place there, as a rule, if we thought he was all right in a stope, we would put him in a stope.

Q. But you did that yourself?

A. Yes, sir, that was up to you.

Q. Witkouski didn't have anything to do with that?

A. No.

MR. PLUMMER: That is all.

RE-CROSS EXAMINATION by

MR. WAYNE:

Q. Did you ever know of a case where the pusher of a shift or of a shaft crew recommended a man for discharge and the shift boss or foreman refused to discharge him?

A. Well, we would say he didn't want that man, and you could put him in a stope.

Q. That is it, that was the custom. If Witkouski at any time said that he didn't want Egbert he would be discharged, wouldn't he?

A. Not necessarily discharged. He would be put in a stope.

Q. But he would be discharged from that job?

A. From that position, yes.

MR. WAYNE: That is all.

RE-DIRECT EXAMINATION by

MR. PLUMMER:

Q. Could Witkouski even discharge part of his own mucking crew?

A. He could—if he didn't want them there he could send them up to one of us.

Q. And you could do what you wanted to with them?

A. Yes.

MR. PLUMMER: That is all.

RE-CROSS EXAMINATION by

MR. WAYNE:

Q. And if he didn't want them you could what you men say, "send them down the hill"?

A. No.

MR. WAYNE: That is all.

MR. PLUMMER: That is all.

J. H. LYTTON, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. PLUMMER:

Q. What is your name?

A. J. H. Lytton.

Q. Where do you live?

A. I live at Gem, Idaho, at present.

Q. For whom are you working?

A. Myself.

Q. You are working for yourself?

A. Yes, sir.

Q. Were you working for this defendant company at the time this accident occurred to Mr. Witkowski?

A. Yes, sir.

Q. What shift was you on, as distinguished from the shift that he was on when he was injured?

A They relieved our shift. Mr. Witkouski's shift relieved mine.

Q. What position did you hold with the shift you was with?

A. Hoist man.

Q. This same hoist?

A. Yes, sir.

Q. State whether or not you had charge of that hoist?

A. I did. I thought I did.

Q. Who was your boss, who was the boss of the— the pusher that come on the same shift you did?

A. Mr. Jacobson.

Q. Was that the same number of men?

A. Yes, sir.

Q. State whether or not Jacobson could discharge you?

A. Well, I never felt that he could. I was hired by the foreman, and the foreman gave me my orders, and I felt that I was under the foreman, although in the way of work I listened to Mr. Jacobson, and whatever he said went with me, in the way of work.

Q. But with reference to taking care of the hoist?

A. I did that myself.

Q. Did Jacobson have anything to do with that?

A. No, sir.

Q. What was Jacobson's orders confined to, what part of the work was his orders to you confined to?

A. Well, anything in the way of the work. It didn't matter what it was. In case of hoisting or



lowering, if he happened to need anything, send it to him, anything of that sort.

Q. Things he wanted to use down below?

A. Yes.

Q. Who was your immediate superior officer that was immediately over you, with reference to handling and taking care of the hoist?

A. Mr. Hughes.

Q. What office did he hold?

A. He was the master mechanic.

Q. State whether or not he had charge of the mechanical appliances of the mine?

A. That was my understanding, yes, sir.

Q. Including this hoist?

A. Yes, sir.

MR. WAYNE: If Your Honor please, unless the witness knows I don't think he should answer what his understanding is.

THE COURT: Well, he has already answered. You can cross examine him later.

MR. PLUMMER: Q. What was the condition of this hoist with reference to the clutch being loose, or any condition of the clutch, when you left it and turned it over to Mr. Egbert?

A. The clutch was loose. I had loosened it when we started to unwind this cable.

Q. Was it necessary for you to loosen it?

A. On account of the loosening of the drum so that we could pull the cable off the drum.

Q. Why did you have to loosen it? Why was it necessary to loosen it?

A. The drum shaft was sprung on the hoist, and by running with the clutch close enough to pull the weight, the load it had to pull, it would come around and catch, and would connect you with the engine when your clutch was throwed out, and therefore you would have to pull the whole engine to unwind this cable, and to release that we would loosen this clutch bolt.

Q. If it hadn't been sprung would you have had to loosen it?

MR. WAYNE: I object to that as leading.

THE COURT: Overruled.

MR. PLUMMER: Q. Would you have had to loosen it if it hadn't been sprung?

A. No. If the clutch had been in proper shape we wouldn't, no, sir.

Q. That is what I mean. Who told you to loosen it?

A. Mr. Hughes.

Q. Did he ever loosen it himself?

A. No. He had me to. He come on the first time that we unwound this cable, and it was in my shift, and he come in and told me to loosen the clutch, and I did so.

Q. I wish you would go ahead and describe now any other conditions of that hoist that was loose, which would cause the drum to revolve around, or cause the clutch to slip, or have any relation to the slipping of the clutch at all.

A. Well, the first thing, the clutch shaft—you see there was an arm worked on the bottom of that

shaft, and then up here at the top there was one that throwed this clutch in and out, and the connection was loose in both of those. The rod that connected this lever to this shaft, you had to watch that or the nut would work off of that all the time, you would have to keep watch on those things, to keep them from dropping off, which we did, and also the key in the collar of the clutch was loose, and we would have to tighten that up all the time.

Q. How did that condition affect the looseness of the clutch?

A. You had so much lost motion there, was all. That was why we had to run this clutch so close, there was so much lost motion that in throwing your lever either way it wouldn't open your clutch band wide enough. If the thing had been tight it would have given more space between the clutch band, so that you wouldn't have lost this motion, you see, and by having that loose, that caused us to run this band so close, and then whenever we would go to throw the clutch out it would run so close we would pick up the engine where this shaft was sprung; every time it come to a certain place, every revolution it made, it would pick up the engine.

Q. Could the hoist have been repaired or fixed so as to obviate the necessity of loosening this?

A. Yes, I think so.

Q. Just state how.

MR. WAYNE: I object to what the witness thinks.

A. Well, yes, it could.

MR. PLUMMER: Q. Just state how, and what was necessary to be done.

A. By putting in new keys in this place it would have stopped all that, keys to fit.

Q. And what was the condition of the drum itself, with reference to the unevenness of it, or if there was any bunches on it, or unevenness, just tell that.

MR. WAYNE: I object to that. There is no charge that there was anything wrong about the drum or the cable.

MR. PLUMMER: We say generally that the whole hoist was out of order.

THE COURT: The objection is sustained. You said generally it was out of order, and then you specified the particulars.

MR. PLUMMER: I thought the charge was so general that it would cover any defect in it.

THE COURT: You might call my attention to it. In reading the complaint, I thought you specified certain particulars that you relied upon.

MR. PLUMMER: No, we haven't.

MR. WAYNE: They specify them in paragraph 12, if Your Honor please.

MR. PLUMMER: My only object is not for the purpose of proving a defect in the drum itself, but simply I want to show what would be the effect on the bucket from the cable going over this, if there was a lump on there, cause it to jerk, and thereby cause it to accelerate the speed, and prevent it from being held to some extent.

THE COURT: The objection is sustained.

MR. PLUMMER: An exception.

Q. I wish you would describe, Mr. Lytton, just how you operated that hoist with reference to lowering men down. What was the custom there all the time you were there, not only with this hoist, but all the hoists in the mine that you knew anything about, what you did in lowering the men, so as to retard going down just as fast as you wanted to?

A. Well, we threw in our clutch, and then we opened our air release, and started the men down. When I opened this air release I always held them with the brake until I opened the release, and then slowed up with the brake, and then I aimed to put them down about a certain speed all the way, and regulated that with the brake.

Q. That is when you go down gradually.

A. Yes.

Q. The lowering of the men was done by the operation of the engine itself, and the compression of the engine?

A. Yes, sir, the engine compressed its own air, and it traveled just the same down as it would up. You would have to give it the air to come up. It made its own air going down.

Q. In case this clutch was loose, would your engine have any retarding effect at all when you tried to lower the men down?

A. No, sir, not if the clutch was loose.

Q. How long would it take you before you could apply the emergency brakes if you found the engine wouldn't hold it?



A. In an instant.

Q. In the meantime it could have dropped some number of feet?

MR. WAYNE: That is leading.

MR. PLUMMER: Q. How far could it have dropped before you could have stopped it?

A. Well, if a man is looking what he is doing he will never let it drop no distance.

Q. Providing he can do it quick enough?

A. Well, you can work—you have always got a firm pressure with your brake all the time.

Q. If you didn't anticipate it you wouldn't be prepared would you?

A. The chances are that bucket may drop ten feet with you before you would realize just what happened.

MR. PLUMMER: I think that is all.

CROSS EXAMINATION by

MR. WAYNE:

Q. Mr. Lytton, you worked on Jonas Jacobson's shift or crew?

A. Yes, sir.

Q. And there were five of you on that crew?

A. Yes, sir.

Q. You all worked under the general direction of Jacobson?

A. Yes, sir.

Q. Now that particular day, the latter part of your shift, you had been uncoiling and coiling this cable upon the drum, had you not?

A. Re-winding, yes, sir.



Q. It was customary when you went to unwind the cable to loosen the clutch, was it not?

A. Yes, sir.

Q. And you loosened the clutch by taking a wrench and loosening that bolt at the top?

A. Yes, sir, loosening the nut on the bolt.

Q. And you did that on this day?

A. Yes, sir.

Q. And as long as the clutch was in there would be some friction to pull against when you uncoiled or unwound the cable, wouldn't there?

A. Well, as long as the clutch is in you would have to pull the whole engine. It wouldn't slip as long as your clutch was in. You would have to back your whole engine to unwind.

Q. And on any hoist you ordinarily will loosen the clutch before you unwind the cable?

A. No; if the hoist is working as it should work, all you have to do is to throw your clutch out, and that releases the drum.

Q. Does it release it entirely?

A. Yes, sir, it should release it entirely, if it is working right.

Q. When you went off shift that day the job of re-coiling the cable had not been completed?

A. No, sir.

Q. Do you know of its having been rewound at any time on Witkouski's shift?

A. Yes, I remember of one time, of its being rewound on his shift.

Q. And it was always customary to loosen that clutch to do that?

A. Yes, sir, it was.

Q. Did Witkouski know of that fact?

A. I suppose so. I couldn't tell you whether he did or not.

Q. Now on that particular day did you tell Ebbert—

A. No, sir.

Q. —that you had loosened the clutch?

A. No, sir.

Q. And as a matter of fact if you had tightened that bolt at the top when you went off shift the clutch would work, wouldn't it?

A. Yes, sir.

Q. And in lowering men you controlled the hoist, the drum, by either the clutch or the brake, or both?

A. Yes, sir, both, and the air also.

Q. And you say that if the bucket got away you could stop it by the application of the brake, in an instant?

A. If you didn't let it get too much start.

Q. Now then, in stopping it though, the proper way to do would be to apply the brake gradually, so as not to break the cable or jar the men off the bucket, wouldn't it?

A. Yes, sir.

Q. You wouldn't dare throw in your brake all of a sudden?

A. Well, no, it wouldn't be necessary.

Q. And it wouldn't be proper either, would it?

A. No, it wouldn't be proper or necessary to do either one.

Q. Now, Jacobson could have discharged you at any time he wanted to, couldn't he?

A. I never thought so.

Q. But you didn't know.

A. I didn't know.

Q. You always took his orders, took your orders from him, didn't you?

A. Yes, what he gave.

Q. You were all engaged in sinking that shaft?

A. No. I run the hoist.

Q. You were loading the muck up that the other men—

A. I was pulling the muck with the hoist that they sent up, yes.

Q. And you operated the hoist from signals given you by Jacobson?

A. Anybody that gave them. I accepted any signal that was given.

Q. The signals were given from the bottom of the shaft?

A. Yes, sir, as a rule. There was timber men also there, and they were working above the bottom.

Q. Mr. Lytton, irrespective of any condition which you say existed in that clutch, the bucket could still be controlled if the nut was tightened, couldn't it?

A. How is that?

(Last question read.)

A. If the nut was tightened?

Q. Yes, if the nut at the top, which you say you loosened.

A. The nut on the clutch bolt?

Q. Yes.

A. If it was tightened that would tighten the clutch, and then, of course, as long as your clutch was tight there was no chance for any accident of any kind.

Q. Then as a matter of fact, the fact of the matter is that this hoist dropped down because of the fact that nut had been loosened and not tightened afterwards?

A. Yes, sir, I think that was the cause of it.

Q. Do you know Mr. Gregory?

A. Yes, sir.

Q. He was working up there at the time, wasn't he?

A. Yes, sir.

Q. Did you tell Witkouski that you had loosened the nut?

A. No, sir, I didn't tell him that.

Q. Do you remember going to look at this hoist one or two days after the accident, with Mr. Gregory?

A. Yes, there certainly was something. I judge; I don't just remember, but it was a short time after, I think there was Mr. Gregory and Mrs. Witkouski's father, if I remember right.

Q. Now, at that time, I will ask you if you did not have the following conversation in substance and effect with Mr. Gregory: If it is not a fact that he asked you how this accident occurred, and you, going to this nut on the clutch bolt, told him that you had

loosened it; that he then asked you, "Did Witkowski know," or "Didn't you tell Witkowski?" And you said, "Why, yes, of course he knew, because I told him," or words to that effect?

MR. PLUMMER: We object to that as not cross examination.

THE COURT: Overruled. This is laying the ground for impeachment. The witness had stated that he didn't tell Witkowski that. Now counsel is seeking to show that he made a different statement at a different time.

MR. WAYNE: Q. Isn't that a fact?

A. I don't remember of making that remark.

Q. Do you want this jury to understand that you did not make any such remark?

A. I do not remember of making it.

Q. You don't know then whether you did or did not?

A. No, sir, I couldn't say positively, but I don't remember of making it.

MR. WAYNE: That is all.

RE-DIRECT EXAMINATION by

MR. PLUMMER:

Q. This clutch you speak of, what had been done to that clutch some time before this accident occurred, with reference to taking off anything and putting on something else?

A. Well, this was a new clutch that had been put on. They had taken the original clutch off, that belonged to the hoist, and put this new one on altogether.

Q. What material did they have on the old clutch as friction material?

A. That was wood blocks.

Q. What did they put on here when they changed it?

A. Why, just belting, I think, it looked to be. I never examined it close, but I think that is what it was.

Q. How long was that before the accident?

A. That was on the hoist when they set it up at the new shaft.

Q. The change was made before that, then?

A. Yes, the change was made before they set it there.

MR. PLUMMER: That is all.

RE-CROSS EXAMINATION by

MR. WAYNE:

Q. That clutch band that was replaced on the hoist at that time was considerably larger than the one that had been on up at the other place, wasn't it, or was it?

A. No, I don't believe it was. There couldn't have been much difference.

Q. The clutch band is circular, a circular band of spring steel, is it not?

A. I couldn't tell you whether it is spring steel, but it is of that nature, yes, sir; I couldn't say.

Q. How wide is that band?

A. That band is I should judge about three inches and a half or possibly four. I never did pay par-



ticular attention, but I judge somewhere in that neighborhood.

Q. About what was the diameter of the end of the drum where it fitted on, where it clutched? Sixteen or eighteen inches, wasn't it?

A. Yes, it was that much, something in that neighborhood, eighteen or twenty inches, possibly; I wouldn't be positive.

Q. Possibly twenty inches?

A. Yes, sir.

Q. So that it had a braking or clutching surface of something like 180 square inches, didn't it? If the diameter was twenty inches, the circumference would be about sixty, would it not?

A. Yes.

Q. And three inches wide?

A. It was good three inches wide. Yes, it had something like that, I think.

MR. WAYNE: That is all.

MR. PLUMMER: That is all. If the court please, I would like to ask Mr. Egbert a question about a matter I haven't asked him about before I put him on the stand. I haven't talked to him about it, and I would like to ask him a question about it.

THE COURT: We will take a ten minute recess, gentlemen.

(Ten minute recess.)

MR. PLUMMER: I will call Mr. Egbert for one question.

JOE EGBERT, heretofore duly sworn on behalf of plaintiff, upon being recalled, testified as follows:

DIRECT EXAMINATION by

MR. PLUMMER:

Q. Mr. Egbert, after you saw that the clutch was loose and there was no control over the lowering of the bucket through the medium of the engine, state whether or not you stopped the descent of the bucket as soon as you were able?

A. I tried my best to stop it gradually.

Q. You made the effort to stop it as soon as you could after you discovered that you had lost control?

A. Yes, sir.

Q. Just state why it was you wasn't able to stop it before you did?

MR. WAYNE: He has testified to that already.

MR. PLUMMER: No, he hasn't covered that point at all.

THE COURT: He may answer.

A. The weight in the bucket, in case the clutch slip, is very hard to stop, and I believe I done very well to stop the bucket in the distance, without any accident to the men in the bucket.

Q. How quick did it drop?

A. I couldn't tell you. I couldn't see the bucket.

Q. But you could tell from the cable?

A. It went very fast.

MR. PLUMMER: Take the witness.

CROSS EXAMINATION by

MR. WAYNE:

Q. You don't know how fast it went down?

A. I couldn't tell you.

Q. And you were able to control it with the brake just as soon as you saw that it was dropping?

A. Yes, sir.

MR. WAYNE: That is all.

MR. PLUMMER: That is all.

We will call Mr. Hare.

TOM HARE, produced as a witness for and on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. PLUMMER:

Q. State your name.

A. Tom Hare.

Q. Where do you reside?

A. Frisco, Idaho.

Q. What business are you in?

A. I was working outside at present.

Q. You are not working for this company now?

A. No, sir.

Q. Were you working for this company at the time of this accident?

A. No, sir.

Q. How long had it been that you had quit there before the accident?

A. I would judge about two weeks.

Q. And what were you doing, what work were you engaged in, at the time you quit?

A. Running this hoist.

Q. Running this same hoist?

A. Yes, sir.

Q. How long had you been running this hoist before you quit?

A. About a month.

Q. In this same shaft, was it?

A. The same shaft.

Q. Who was the pusher on the shift that you was running the hoist on?

MR. WAYNE: I don't think that is material. That was more than a month before this occurrence.

MR. PLUMMER: Q. How long did you say?

A. Not over two weeks, I don't think.

MR. PLUMMER: I thought counsel misunderstood him.

MR. WAYNE: Well, even two weeks.

MR. PLUMMER: We have a right to show the condition of the hoist for some time before that.

MR. WAYNE: I am not objecting to that.

THE COURT: He may answer.

A. Ole Hoke.

Q. State whether or not they were doing the same class of work described here, about sinking this shaft.

A. The same class of work.

Q. You were in charge of this same hoist, I believe you said?

A. Yes, sir.

Q. Did Hoke have anything to do with you, about giving you any directions or instructions about how to repair this hoist or keep it in shape or what to do with it?

A. None whatever.

Q. Who was you responsible to directly?

A. McDonald, the foreman of the mine.

Q. What member of the mechanical department, if any, had charge?

A. Mr. Hughes.

Q. What was his office?

A. Master mechanic.

Q. At the time you left there, two weeks before this accident occurred, I wish you would describe just what condition that hoist was in.

A. It was in very poor condition.

Q. What do you mean by very poor?

A. It was loose.

Q. How long have you been handling hoists and working in mines and doing work of this character?

A. Eighteen years.

Q. Did you consider that a reasonably safe hoist to use in an operation of that kind?

MR. WAYNE: I object to that as immaterial, and not one of the charges of negligence in the complaint.

MR. PLUMMER: I think it is.

THE COURT: Reasonably safe in what respect?

MR. PLUMMER: With reference to the condition of the clutch and the bolts. I will limit it. In regard to the bolts, lugs, that is, which fastened the clutch, or were connected with the clutch, and the way it was fastened to the drum, and also including the brake of the clutch, and all matters and things which directly affected the clutch and the operation of the clutch and the operation of the drum, did you consider it in a reasonably safe condition in the way in which it was at the time you left it?

A. No, sir.

MR. WAYNE: I object to that further because it calls for the opinion of the witness.

MR. PLUMMER: He certainly has had considerable experience, eighteen years of it.

MR. WAYNE: It is not open to the opinion of expert witnesses. Also no foundation for it. The testimony so far is confined to a clutch loosened by the act of one of the servants, done probably—

THE COURT: Do you promise to show that the clutch was in the same condition at the time of the accident as it was when this gentleman left the employ of the company?

MR. PLUMMER: Substantially, yes, sir, I think absolutely. I will withdraw that question temporarily and ask him the condition it was in, so as to compare.

Q. Just state what condition this hoist was in, with reference to these portions that I have spoken of, at the time you left it, two weeks before this accident occurred.

MR. WAYNE: The same objection to that.

THE COURT: Overruled.

A. It was loose, the keys were loose in the arms of the clutch.

THE COURT: The keys in the arms?

A. That connected the arms on to the clutch. There was three keys in that, three arms, connected with the shaft.

MR. PLUMMER: Q. What was the condition of the shaft that the drum was on?

MR. WAYNE: I object to that as not one of the grounds of negligence mentioned in the complaint.

THE COURT: Sustained.



MR. PLUMMER: It has been admitted without objection heretofore.

MR. WAYNE: No, it was ruled out upon objection.

MR. PLUMMER: It was ruled out with reference to the raised portions on the outside of the drum, but the court permitted Mr. Lytton to testify, where it wasn't objected to, that the shaft was sprung, and made it wobble.

MR. WAYNE: If Your Honor please, Mr. Lytton was speaking of the shaft, and the evidence was plain on the question, that he was speaking of that cam shaft at the bottom, that works the clutch, revolves and pushes in the clutch.

MR. PLUMMER: He described, if Your Honor please, the shaft that run through the drum, and showed how it was sprung and wobbled, and what effect it had on the clutch, and described why it was necessary to loosen the clutch.

MR. WAYNE: If Your Honor please, if there is any such testimony as that on the record I move at this time that it be stricken out, because it is not embraced within the complaint, or any act of negligence charged in the complaint.

MR. PLUMMER: We have to show the relation of the clutch to the drum, and show why it was necessary to loosen these bolts which he did loosen, in order to use it at all, and therefore it would mean—I have to show the connection between the falling and the condition of this hoist.

THE COURT: But that condition of the shaft is

not shown or claimed to have had anything to do with the failure of the clutch to operate.

MR. PLUMMER: I think Mr. Lytton so testified, if Your Honor please.

MR. WAYNE: Mr. Lytton said expressly that the only reason for it not working was the fact that he himself had loosened this one bolt.

MR. PLUMMER: And he said why he had to do it was because this thing was sprung and didn't fit.

THE COURT: Yes, that is true, but you are asking whether this was in a condition to operate. It made no difference in the operation of it whether this was sprung or not, when the clutch was properly adjusted. In other words, the only reference to that, or the only reason for making reference to it, was to explain why he loosened the clutch when they rewound the cable.

MR. PLUMMER: That is correct. Why it was necessary to loosen. It shows the whole defective condition, relating directly to the cause of the dropping of this bucket.

THE COURT: I don't know what it has to do with this witness.

MR. PLUMMER: I am trying to show now the same condition the other witness has testified to, show whether or not that was a reasonably safe condition.

THE COURT: The objection is sustained.

MR. PLUMMER: Q. What relation did these loose keys that you speak of have to the clutch, with reference to the clutch being loose, or the necessity for loosening it?

MR. WAYNE: The same objection to that.

THE COURT: Overruled.

A. In the clutch—they had this relation, that they left that much lost motion in the clutch.

Q. Did you hear Mr Lytton's description of the condition of the hoist when he used it on this shaft preceding the accident?

A. Today?

Q. Yes.

A. Yes.

Q. I will ask you to state whether or not this hoist was or was not in substantially the same condition as he described, when you left it two weeks before this.

A. The same condition.

Q. Now I will ask you, based upon your experience in handling hoists in mines, state whether or not in your opinion this was a reasonably safe hoist to have used for the purposes for which it was used, at the time this accident occurred?

MR. WAYNE: We object to that as calling for an opinion of the witness upon a subject which is not the subject of expert testimony, and wouldn't be within the province of the jury to say if here, the description of its condition, whether or not it was reasonably safe. It is trespassing on the province of the jury.

THE COURT: Sustained.

MR. PLUMMER: Q. State whether or not, in your experience, it was customary in mines of this kind to operate a hoist in performing the kind of

work that was being performed here, as testified to heretofore, in the condition which this hoist was in when you left it?

MR. WAYNE: I object to that as incompetent, irrelevant, and immaterial.

MR. PLUMMER: A custom of other operators certainly would be a circumstance.

THE COURT: Sustained.

MR. PLUMMER: On the theory that we couldn't show what was the custom of other— ?

THE COURT: Yes, I think you can get at this much more directly. If there was any defective condition here the witness can state what that was, and what the effect of it would be, and then it is for the jury to say whether or not it was in a reasonably safe condition, mechanical condition.

MR. PLUMMER: Q. What effect did the condition of this clutch and this hoist that you have described have upon its operation and the manner of its operation?

A. It would have the effect that it wouldn't be safe to operate.

Q. I mean in what way, just describe that.

A. You mean describe the— ?

Q. Describe why it wouldn't be safe.

A. Those keys are liable to drop out at any time and disconnect the clutch from the drum.

MR. WAYNE: I object to that, and move that that answer be stricken. I apprehend that a screw which is still holding and in position after an accident cannot be blamed.

THE COURT: Let him finish his testimony, Mr. Wayne, and if this all there is to it you can move to strike it out later on. This is somewhat preliminary, I assume.

MR. PLUMMER: Q. I think you have described the effect of the looseness of these keys, I believe you have described that as causing lost motion. What effect does lost motion have on the clutch?

A. It wouldn't tighten the clutch, properly tighten it.

Q. Why was it necessary to loosen and tighten this bolt that has been described?

A. It was necessary to do that in order to revolve the drum on the shaft.

Q. State whether or not that necessity was due to these other conditions that you have described.

A. It was.

MR. PLUMMER: Take the witness.

CROSS EXAMINATION by

MR. WAYNE:

Q. The lugs and screws which held the clutch were all in position at the time you left there, were they not?

A. Yes.

Q. And they were all holding the clutch, were they not?

A. Partly holding it.

Q. And the clutch engaged the drum and held the drum and transmitted the power of the engine to the drum in the manner in which it was expected to do?



A. Yes, sir.

Q. And the only thing you had to do was, when you uncoiled or unwound the cable, you loosened the nut on the clutch bolt?

A. It wasn't necessary to do that.

Q. Well, you did it if you wanted to release the clutch, didn't you?

A. You would have to, in the condition the clutch was in.

Q. And on the other hand, when you were through unwinding the cable and winding it again, you could tighten that nut on the clutch bolt and it would hold?

A. It might.

Q. Well, it did, as a matter of fact, didn't it?

A. It did sometimes, I suppose.

Q. What is that?

A. It would for a while.

THE COURT: Did it while you were there?

A. No.

Q. Did it slip to any great extent?

A. When those keys got loose in the clutch it would slip.

Q. Then you would tighten up the screw again?

A. Didn't tighten any screws, no.

Q. How did you stop the slipping then?

A. Tighten the keys.

Q. And then it wouldn't slip?

A. Not much, no.

Q. In all of these small hoists that they are using in such work as that the clutch slips at different times, doesn't it?



A. I don't know if all of them do or not.

Q. The ones you have worked on do occasionally, don't they?

A. Very little.

MR. WAYNE: That is all.

RE-DIRECT EXAMINATION by

MR. PLUMMER:

Q. State whether or not you ever advised the master mechanic with reference to the condition of this hoist, and the danger of operating it.

A. I did.

MR. WAYNE: I object to that, if Your Honor please. There is no claim here that there was a notification of the defendant.

MR. PLUMMER: We don't need to claim it. It is a question of negligence.

THE COURT: Overruled.

MR. PLUMMER: Q. What did you say to him?

A. I pointed out its defects, those defects in the clutch to him.

Q. What did you tell him it would cause if they weren't fixed?

A. I told him it would cause—

MR. WAYNE: I object to that.

THE COURT: Sustained. It isn't a question of what opinion this witness had. If he called attention to the—

MR. PLUMMER: Q. Would the condition of this hoist as you have described it cause the operator to lose control of it?

MR. WAYNE: I object to that.

THE COURT: Sustained.

MR. PLUMMER: Q. What effect did it have upon the operation of it?

MR. WAYNE: The same objection.

THE COURT: What effect did what have?

MR. PLUMMER: The condition he has described, the loose keys, and the condition of the clutch. I asked him what effect they had on the ability of the hoist man to control the operation of the hoist.

MR. WAYNE: I object to that because it calls for the opinion and conclusion and conjecture of the witness.

THE COURT: It seems to me we have been over this in a way. It is very easy for this witness to answer this question in any way, and it would be almost impossible to know what he meant by it.

MR. PLUMMER: I will have him explain it then afterwards. I will have to ask the preliminary question first.

THE COURT: Very well. He may answer.

WITNESS: What was the question?

(Last question read.)

MR. PLUMMER: Q. And the control of the operator of the hoist.

THE COURT: That is, what effect did these conditions to which you have referred have upon the operation of this hoist while you were operating it, as a matter of fact, if they had any effect at all. It isn't a question of your opinion. It is a question of fact.

A. You were liable to lose control of it at any time.

THE COURT: The answer will be stricken out. Did you understand the question, witness? I impressed upon you that the question sought to elicit information as to what the effect was as a matter of fact, while you were handling the hoist; not your opinion as to what it was likely to be, or what might be, but did you have any trouble with it?

A. Yes.

THE COURT: State what it was.

A. I have had trouble with those keys getting loose.

THE COURT: The question is, whether you had any trouble in controlling the hoist and using it.

A. I had, controlling it, to start the bucket sometimes.

THE COURT: Proceed.

MR. PLUMMER: What kind of braking material was on this clutch?

A. It looked like common belting.

MR. PLUMMER: You may take the witness.

RE-CROSS EXAMINATION by

MR. WAYNE:

Q. As a matter of fact, you could always control this hoist with either the brake or the clutch, couldn't you?

A. Not with the clutch.

Q. Is it not a fact that when the nut on the clutch bolt was tightened, that you could control it with the clutch?

A. No.

Q. Mr. Lytton says the—

MR. PLUMMER: We object to what Mr. Lytton says.

THE COURT: Sustained.

MR. WAYNE: That is all.

MR. PLUMMER: That is all, Mr. Hare, I will call Mr. Jacobson.

JONAS JACOBSON, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. PLUMMER:

Q. You may state your name.

A. Jonas Jacobson.

Q. Were you one of the pushers we have referred to, working for the Interstate Company at the time this accident occurred?

A. Yes.

Q. What shift were you on, with reference to the shift that Mr. Witkouski was on?

A. Witkouski relieved me.

Q. What authority did you have, if any, as pusher, acting in the same capacity as Mr. Witkouski was, with reference to hiring and discharging the engineer running the hoist?

A. I didn't have any authority to discharge him. I had authority to tell him to go and see the foreman, if he didn't suit me.

Q. Who would you report to, as to him not suiting you?

A. To the foreman.

Q. And then the foreman did whatever he wanted to, did he?

A. Yes.

Q. Did you have any authority, or did you give any orders to the engineer about repairing or taking care of his hoist?

A. Not about the hoist.

Q. What was your orders confined to?

A. Well, it was confined to telling him—you mean the hoist man?

Q. Yes.

A. Well, if there was anything on the station to do, cut fuse, and so on, and caps, and do things like that, around the station, when he wasn't busy running the hoist.

Q. When you wanted to come up how did you signal him?

A. I would ring the bell for him.

Q. When you was on shift where was you all this time?

A. Mostly in the sump.

Q. You mean the bottom of the shaft?

A. The bottom of the shaft.

Q. Working with and directing the men you had down there?

A. Yes, sir.

MR. PLUMMER: That is all.

CROSS EXAMINATION by

MR. WAYNE:

Q. Mr. Jacobson, there were five men on each of these shaft crews, were there not?

A. Yes, sir.

Q. And the pusher was the boss of all of the men?

A. Yes, I was boss for the five of them, except the hoist man to a certain extent.

Q. The hoist man was engaged in lowering down supplies to you and in taking up the muck that you made?

A. Yes.

Q. And the other men were engaged in getting out muck from the bottom of the shaft?

A. Well, I was there too.

Q. And you told the hoist man when to pull up the bucket and when to lower it?

A. I rang the bell.

Q. And you gave him orders as to doing other chores and errands around the mine?

A. Not around the mine.

Q. Didn't you use to send him for fuse and powder?

A. No, sir.

Q. You didn't use to send your men. Do you know whether or not Witkouski did?

A. I do not.

Q. You wouldn't know?

A. No.

Q. You say that at any time when he didn't suit you, you could send him to the foreman?

A. Yes, sir.

Q. And he would then be discharged, would he not?

A. I don't know anything about that.

Q. But you would take him right off the job and send him to the foreman.



A. I couldn't take him off the job. I could tell him to go and see the foreman when he went off shift.

Q. Mr. Jacobson, you were on the shift before Witkouski came on?

A. Yes.

MR. WAYNE: That is all.

MR. PLUMMER: That is all, Mr. Jacobson.

J. O. GELLICE, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. PLUMMER:

Q. State your name.

A. J. O. Gellice.

Q. Where do you reside?

A. Spokane, Washington.

Q. How long, how many years, if at all, have you been engaged in mining and the operation of mines, as superintendent and mining engineer and master mechanic, general foreman, and all of those positions of authority, in and about mines of the character of the Interstate-Callahan, if you know the character of that mine, including the Coeur d'Alenes?

A. Twenty years last March.

Q. Just state what experience you have had in those capacities that I speak of, which had to do with the operation of machinery, such as hoists and appliances of that kind.

A. In other words, a service record over that period of time?

Q. Well, just in a general way. I just want to

show your experience, to see whether or not you are qualified.

A. My experience extends from Leadville, Colorado, from there to the Butte camp.

Q. Just tell what companies.

A. I was with the Little Johnny mine in Leadville, Colorado, in 1896.

Q. In what capacity there?

A. On a hammer, miner's pay.

Q. Then what?

A. In the spring of 1897 I went to Butte and worked in the Raris shaft in Butte in 1897; and in the fall of 1897 I came from there to the Coeur d'Alenes, and was employed by the Bunker Hill, and stayed with them that winter, leaving the following spring, and went into the employ of the Frisco Company, which company I was with for something over two years, running hoists and mining. I was contracting there as well when I first went there. I ran the first motion (?) hoist at the Frisco mine for something over a year.

Q. What positions have you held as general foreman and as master mechanic, and for how many years during that period?

A. From that point I went in charge of the sample works jointly with Mr. Clagget for a year and a half, during the administration of the Mine Owners Association in the Coeur d'Alenes. At that point I joined the Allis-Chalmers Company as construction engineer for them.

Q. What kind of machinery?

A. Mining Machinery. I was with them and the engineering department of the Brady Company and the Allis-Chalmers for a period of something over two years. Afterwards, in British Columbia, I was district manager for that company, and joined the Bagdad-Chase Company, operating in California and Idaho.

Q. What kind of operations?

A. In mining in general. From that point I went with the Inspiration Copper Company of Globe, Arizona, as general superintendent there.

Q. How large a mine is that?

A. Employing about 1500 men, or thereabouts.

Q. What was you doing?

A. General superintendent during the summer of 1910.

Q. Did you have charge of and oversee the operation of the hoists, of the kind that have been described here?

A. I have at all times, yes, in my operations.

Q. Have you seen these photographs that have been offered here?

A. I have.

Q. Have you heard the description by the witnesses as to the condition of this hoist at the time this accident occurred?

A. I have.

Q. I wish you would describe what was the effect on that hoist and those operations, from the conditions which they have described as existing with reference to the clutch and the keys and bolts.

MR. WAYNE: Just a moment. If Your Honor please, I object to that as incompetent, irrelevant, and immaterial, not being a matter that can be testified to by experts, but being the subject of ordinary testimony. The witnesses have already testified to this. This man apparently has never seen that hoist.

MR. PLUMMER: He has seen pictures of it. It certainly couldn't be claimed that a witness wouldn't be competent because he never happened to see a particular hoist.

MR. WAYNE: This isn't the subject of expert testimony, if Your Honor please. He is simply going to give his opinion now as to what would be the result of these different things that have been testified to.

MR. PLUMMER: Certainly.

MR. WAYNE: It is incompetent and irrelevant.

THE COURT: I think I shall sustain the objection to this general question. Now, if you desire to make a record, Mr. Plummer, you make direct his attention to some particular thing, in the way of a hypothetical question, and then I will determine whether or not I will let him testify.

MR. PLUMMER: Q. This hoist that you see these photographs of, assuming that it was, on account of loose keys and the condition of the clutch that has been testified to here, what effect would that have upon the control of that hoist by the operator of it?

THE COURT: That is conceded, isn't it?

MR. PLUMMER: I don't know.

THE COURT: It was disabled as it was just at that time. I understand that they concede that in the condition in which it was at the time of the accident the clutch would not control it.

MR. WAYNE: We concede, if Your Honor please, that that was the purpose of the clutch, and of course if they go and by some act loosen the clutch—

MR. PLUMMER: Who do you mean by “they”?

MR. WAYNE: The evidence is in as to who did it.

THE COURT: You mean if anybody does?

MR. WAYNE: Yes, if anybody does. It doesn't make any difference.

THE COURT: I see no reason for expert testimony on a matter that is admitted.

MR. PLUMMER: Very well.

Q. You heard the testimony, did you, of these witnesses, as to just how this cable was connected with the drum, and the weight that was in the bucket and on the bucket, and the weight of the bucket itself?

MR. WAYNE: I object to even that preliminary question, for the reason that there is no question raised as to the buckets or the coiled cable on the drum, or the drum itself.

THE COURT: You would better finish your question.

MR. PLUMMER: Q. Assuming, however, — I will change the form of that question. Assuming now that by reason of the clutch not working, and there being no resistance to the drum conveyed from the clutch, no connection between the motive power,



the engine, and the drum, on account of the clutch slipping, as has been described here, and there being no resisting power upon the cable excepting the friction which would be caused by the drum itself in unwinding, and the resistance from the sheave wheel, over which the cable went, assuming that there was about 1200 pounds of weight in that bucket, I wish you would state approximately your opinion with reference to the speed at which that bucket would descend during the first 150 feet, that is, the maximum speed it would reach until control had been obtained by the operator of the hoist.

MR. WAYNE: I object to that as calling for the conclusion and the pure guess work and conjecture of the witness.

THE COURT: The objection is sustained. There is no justification for the assumption thus far that the clutch didn't offer any resistance at all.

MR. PLUMMER: I understood it was completely separated from the engine. He said it wouldn't hold at all. He said he lost control.

THE COURT: Well, he lost control, but you might lose control even with some resistance on the part of the clutch. He said he tried to raise the men later on, but he couldn't raise them, but it doesn't appear that if the load had been lighter that he couldn't have raised a lighter load. No one would be justified in concluding from the evidence thus far that the clutch did not come into contact at all with the drum shaft. If there is any doubt about that in your mind, if you think the contrary, you may recall these witnesses and ask them about that.



MR. PLUMMER: Well, I certainly would like to, because that is my understanding. I will withdraw you for a moment and will call Mr. Hare.

THE COURT: Mr. Hare wasn't present at the time. He wouldn't be competent to testify.

MR. PLUMMER: Well, I will call Mr. Lytton then. He said it was in the same condition it was in before.

THE COURT: No, he didn't testify that this bolt or set screw was loose or had been loosened.

MR. PLUMMER: I will call Mr. Lytton.

J. H. LYTTON, a witness heretofore duly sworn on behalf of plaintiff, upon being recalled, testified as follows:

DIRECT EXAMINATION by

MR. PLUMMER:

Q. Mr. Lytton, when this clutch was loose, as you have described, was there any resistance at all from the clutch on the drum?

A. Yes, there was some resistance.

Q. About how much?

MR. WAYNE: I object to that as calling for the conjecture of the witness. I don't know that—

THE COURT: Mr. Witness, supposing that the clutch and the mechanism connecting it was in the same condition when these men got on the bucket that evening and started down, and the other hoist man undertook to operate the hoist, suppose that he used the hoist lever, so far as he was able, would or would not the clutch come into contact with the drum shaft?

A. No, it was already throwed in as far as I could throw it, the clutch was. You see when I loosened the clutch I throwed the clutch out, and then I loosened the nut on the bolt to loosen the clutch band just enough to release the drum, and then by throwing the clutch back in, not tightening the nut, would give some resistance.

Q. That is, the nut being left in the way in which you left it?

A. Yes, sir.

Q. And throwing the clutch back in?

A. Yes, sir.

Q. It would afford some resistance to the drum revolving?

A. Yes, sir.

MR. PLUMMER: Q. Can you describe how much?

A. No, I couldn't exactly. I don't know how much, but it would be some.

Q. How much resistance would there be if there was 1200 pounds of weight on this bucket, pulling against this drum? Would there be any appreciable resistance?

A. No, not to hold that load.

Q. Would there be any appreciable resistance, anything you would notice?

A. Yes, there would be enough resistance so that it would hold and move your engine, and at times when this come around, this shaft being sprung, when it comes to certain places, would pick up and hold tighter right there, and just as soon as it would go over it would release again from the engine.

Q. It was intermittent?

A. Sir?

Q. Spasmodic or intermittent?

A. Yes, sir.

MR. PLUMMER: That is all.

CROSS EXAMINATION by

MR. WAYNE:

Q. Then as a matter of fact, when the clutch was loosened and this nut on the end of the clutch bolt was loosened, it held better because the shaft was sprung, didn't it?

A. No, it didn't hold as well, because it was loosened so that it couldn't hold, you see.

Q. That was the purpose of loosening it?

A. Yes, sir.

MR. WAYNE: That is all.

RE-DIRECT EXAMINATION by

MR. PLUMMER:

Q. On account of the shaft being sprung?

A. Yes, sir.

RE-CROSS EXAMINATION by

MR. WAYNE:

Q. No, the purpose was so you could pull off the cable, was it not?

A. If this drum shaft hadn't been sprung it wouldn't have been necessary to loosen the clutch bolt.

MR. WAYNE: That is all.

MR. PLUMMER: That is all.

Mrs. Witkowski will please take the stand.

BERTHA D. WITKOUSKI, produced as a wit-

ness on behalf of plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. PLUMMER:

Q. Your name is Bertha D. Witkouski?

A. Yes, sir.

Q. You are the plaintiff in this case?

A. Yes, sir.

Q. And Mr. Witkouski, who was killed, was your husband?

A. Yes, sir.

Q. These two little boys are the boys of your—

A. Yes, sir, my children.

MR. WAYNE: Just a moment. There are certain admissions made in the answer. We admit the first five paragraphs of the complaint. We admit that she is the guardian of these children, that they are the children of the deceased; that the deceased was thirty-seven years old, or whatever is alleged in the complaint, at the time of his injury, and there is no issue upon that.

MR. PLUMMER: I think, if Your Honor please, for the purpose of showing just what the value of the care and custody, or the promised care, education, and advice and relations between the father and the children are, although we have alleged it in general terms, and it is admitted by the answer, I think we have a right even in the face of that to go into detail, and show just what his disposition was with reference to the care and education of his children, because that is an element of damage here, the loss of

it, and I think it ought to be allowed, so that the jury can form some opinion as to the value of the loss of those relations and the education and advice and surrounding conditions, and I think for the purpose of showing that, to show that these children are the same children referred to in the complaint.

MR. WAYNE: In the nature of things, of course, that isn't the purpose of it, if your Honor please.

MR. PLUMMER: It certainly is.

MR. WAYNE: And if they have not made their allegations of the complaint as broad in any of these respects, it is their own fault. We have made the admissions of the answer as to all of these facts just as broad as the allegations of the complaint.

MR. PLUMMER: The value of these very things that he admits exist—you can't show the value without showing the details of the particular service promised.

THE COURT: I don't understand what there is before the court.

MR. PLUMMER: I have asked just a preliminary question, as to whether or not these are the children referred to in the complaint.

THE COURT: Counsel admits that they are. Let us get on.

MR. PLUMMER: Q. Where did you live, Mrs. Witkouski, with reference to the mine that Mr. Witkouski was working in?

MR. WAYNE: I object to that, if Your Honor please. There is no issue as to that.

THE COURT: This wont hurt you, Mr. Wayne. The objection is overruled.

A. We lived at the Interstate, not very far from the mine.

MR. PLUMMER: Q. How far?

A. Oh, I don't know just how far it was. We could see the mine, though, from our house.

Q. And your husband, when he was done work, came home from there, walked home?

A. Yes, he spent all of his time at home only when he was at work.

Q. I wish you would state just what his disposition was with reference to caring for, advising and raising these two boys.

MR. WAYNE: I must object to that, if Your Honor please.

THE COURT: Is there an allegation or admission with regard to that?

MR. WAYNE: Yes, there is.

MR. PLUMMER: I want to show the details of it, for the purpose of estimating the amount of the loss.

THE COURT: What is the allegation?

MR. PLUMMER: Paragraph 20.

MR. WAYNE: "That at the time of the happening of the death of said deceased he was thirty-seven years of age, strong, able bodied, sound and robust mentally and physically, was industrious and devoted to his family and took great pains and care with their maintenance and education, and his family was dependent upon him for their support and maintenance.

"That the said Charles Witkouski was earning and



capable of earning at the time of his death and for a long time prior thereto upwards of \$6.00 a day. That had he lived, it was his intention to care and provide for his said family and to give the said minor children the benefit of an education. That they have been deprived of his love, comfort, advice, and counsel, and of his earnings and accumulations, and that by reason of all the matters and things herein set forth," and so on.

MR. PLUMMER: I want to show the value of the things that were promised by the father when he was alive, the value of them.

THE COURT: How are you going to show the value?

MR. PLUMMER: By showing his general disposition and the details.

THE COURT: That is admitted.

MR. PLUMMER: The details are not.

THE COURT: The details can't add anything to the general admission. If he was devoted to his family the jury can fill in the details.

MR. PLUMMER: Q. How much was Mr. Witkouski earning at the time he was killed?

A. He was getting \$5.00 a day and a bonus.

Q. What did those bonuses amount to on an average?

A. Well, the further down they went in the shaft the more bonus they got.

Q. I want to know about what income it brought in?

A. It would be six or seven dollars a day.

Q. Between six and seven dollars a day altogether?

A. Yes, sir.

MR. PLUMMER: That is all.

MR. WAYNE: That is all, Mrs. Witkouski.

MR. PLUMMER: We rest. Do you want us to prove the life expectancy?

MR. WAYNE: Why, I am not putting in your case.

MR. PLUMMER: I know that. I appreciate the fact that you are not trying this side of the case, but I thought you might admit that. It is usually admitted by counsel.

MR. TOWLES: It is 30.35 years, at 37 years of age.

MR. WAYNE: Do you take that from the American Tables of Mortality?

MR. TOWLES: Yes.

MR. WAYNE: I will admit that the American Table of Mortality shows an expectancy of 30.35 years.

MR. PLUMMER: With that, we rest.

MR. WAYNE: If Your Honor please, I desire to direct a motion to the court.

THE COURT: Do you prefer to do it out of the presence of the jury?

MR. WAYNE: Yes, I think it is best.

THE COURT: Gentlemen of the Jury, you may retire for a few moments.

(The jury thereupon retired from the court room.)

MR. WAYNE: If Your Honor please, at the close

of the evidence for the plaintiff, the defendant moves for a non-suit upon each of the following grounds, and for each of the following reasons:

1. That the plaintiff has failed to show any negligence alleged in its complaint which caused or contributed to the death of Charles Witkouski, in the following particulars:

While it is alleged in the complaint that the hoist man, Egbert, was incompetent and negligent, there is no proof or attempt to prove that he was either incompetent or negligent, or if incompetent or negligent, that his incompetency and negligence was known to the defendant, or, by the exercise of reasonable care, could have been known to the defendant.

MR. PLUMMER: I might say we will withdraw that allegation.

MR. WAYNE: For the reason also that it is charged in the complaint that the accident to the plaintiff was caused by the violation of the state statute, being the Session Laws of 1909, beginning at page 266, in each of the following particulars:

That the defendant was engaged in sinking and had sunk a vertical shaft to a depth of over 250 feet, without providing the said shaft with a bucket, skip, or cage, provided with safety clutches, and the evidence of plaintiff herself shows that the bucket in question was provided with the safety devices mentioned and described in the statute, to-wit, a fixed draw head.

The second violation of the statute is that it is claimed in the complaint that at the time of the ac-

cident the defendant was lowering the deceased and other men in this shaft by means of this bucket, at a speed exceeding 600 feet per minute, while the evidence fails to disclose at what speed the bucket was descending, and does affirmatively show that the plaintiff had used ordinary care to see that the bucket was not lowered at a speed in excess of that permitted by the state law.

The third violation of the statute is that it is alleged and claimed by the complaint that the accident was occasioned or contributed to by a failure of the defendant to post upon the gallows frame at the shaft or some other conspicuous place at the mine or in the mine a copy of the mining statute of 1909, while the evidence fails to show that there was such a failure, or that, if there was any such failure, that it was the proximate cause or a contributing cause to the accident to the deceased.

MR. PLUMMER: We admit that that wasn't the proximate cause.

MR. TOWLES: But it wasn't denied.

THE COURT: Do you rely upon any of these three provisions?

MR. PLUMMER: None except lowering the bucket at such a rate of speed.

THE COURT: That is, after the clutch failed to work?

MR. PLUMMER: Yes.

THE COURT: Then it would really come back to a question of the—

MR. PLUMMER: Yes.

THE COURT: Very well.

MR. WAYNE: Now, in so far as it is alleged and attempted to be proven that the condition of the clutch was defective, the evidence fails to show that it was defective, but does show that it was sufficient when properly adjusted, and that the failure to properly adjust it was either the negligence of the hoist man of the preceding shift or the hoist man of the night shift, or of the deceased himself, and that if it was the negligence of either of the hoist men, it was the negligence of a fellow servant of the deceased.

And, another ground: The evidence fails to show, although the charge is made in the complaint, that the brake or the clutch were inadequate, but on the contrary shows that they were sufficient to stop and did stop the descent of the bucket.

And because the evidence affirmatively shows that the deceased met his death by reason of his own culpable negligence.

If the accident was not caused by the carelessness of the deceased, it was caused or contributed to by the negligence of his fellow servant or servants.

The deceased assumed the risk, and each and every one of the risks, complained of by his complaint, including the risk of the negligence of his fellow servants.

Now I have mentioned all of these grounds because they are the acts or omissions that are charged in the complaint. I have enumerated these here, if Your Honor please, and I read now the charges that we were to meet:



First, that Joe Egbert, the hoist man operating the hoist at the time of the accident, was incompetent, inexperienced, nervous and excited. That is now out of the case.

Second. That the bolts, lugs and keys by which the clutch was fastened to the shaft of the drum was loose, worn, and inadequate.

Third. That the brake band and clutch were loose, worn out, inadequate, and unsafe.

There is no evidence as to the brake, as to anything being the matter with that, whatever.

The fourth is, that the clutch and band could not be adjusted by the lever under the control of the hoist man, so as to control the speed of the hoist.

The evidence affirmatively shows that not only could that be done, but that it actually was done at the time of this accident.

Fifth. That the state law was violated in the sinking of the shaft, without providing it with a safety clutch.

They have introduced no evidence on that, but on the contrary the cross examination of the witnesses—

MR. PLUMMER: We admit that that is out of the case.

MR. WAYNE: There is no such thing as a safety clutch.

And sixth. That the cage was being lowered at a greater rate than six hundred feet per minute.

Seventh. That a copy of the state law was not posted on the gallows frame. That is eliminated.



And they charged, eighth, that this company had failed to promulgate any rules for the hoisting or lowering of objects or men. They have apparently overlooked that. There was no evidence introduced; on the contrary, the evidence does show the adoption of written rules.

MR. PLUMMER: We intentionally eliminated that too, for we have certain rules, which are in evidence here.

MR. WAYNE: If Your Honor please, I apprehend that the only claim or grounds of negligence left in this complaint now, and in the evidence, is the claim that the clutch was defective, and for that reason would not hold. I want to take that up from two standpoints, first, as to the facts in regard to it, and, second, if it was out of order, how it got out of order, and, third, the knowledge of the deceased himself of that condition.

Now, the evidence of the plaintiff is undisputed that the real cause of that accident was that Lytton, the engineer or the hoist man on the preceding shift, had, for the purpose of pulling out that cable, loosened the nut on the clutch bolt, and had failed to tighten it, or failed to notify the crew coming on that he had done this, and that for that reason the next engineer began lowering the men without tightening that. The evidence is absolutely undisputed that had that been done the clutch would have worked all right. That is the testimony of Lytton, and that is the testimony of Egbert, and of all of the other witnesses who have testified upon the subject in the case.

Now it is the testimony of Lytton that Witkouski knew that that clutch had been loosened. He says he knew it—

THE COURT: Who testified to that?

MR. WAYNE: Lytton, the preceding engineer.

MR. PLUMMER: That wasn't his testimony at all.

MR. WAYNE: If there is an issue upon that point we will get the testimony.

THE COURT: I think not, Mr. Wayne, and you sought to impeach him by asking him the question whether he had not so stated to someone else, and he denied having so stated.

MR. WAYNE: I am very certain upon that point, if Your Honor please.

THE COURT: It escaped my attention then.

MR. WAYNE: Will you turn to the cross examination of the witness Lytton then, Mr. McClain, and find that part.

(The reporter thereupon began a search of Lytton's testimony, and the argument proceeded.)

(The jury returned into the court room.)

THE COURT: Gentlemen, will it inconvenience you to come at seven? I will make it some other hour, if that is more agreeable.

MR. PLUMMER: Anything suits me, Your Honor.

THE COURT: How about you, Mr. Wayne?

MR. WAYNE: That is all right.

THE COURT: Gentlemen of the jury, I am going to excuse you until seven o'clock this evening.

Remember the hour, and also remember the admonition that I have heretofore given you. You may retire.

(The jury thereupon again retired from the court room.)

THE COURT: This rule 28, gentlemen, provides that it shall be the duty of the mechanical department to daily inspect the hoisting ropes and engines to see that the same are in a safe condition and in proper repair, and if at any time the rope or any part of the machinery shall appear to be out of order, to have the same repaired before continuing with the hoisting.

Now I am inclined rather to take this view of the application of the well-known principles of law, that the occasion for doing what was done in this case, as a result of which the hoisting apparatus became inefficient for the purpose for which it was intended, was the slack in this new cable, incident to its use, that it became necessary to repair it or to readjust it, not because any sudden emergency arose, but, as one witness I think put it, to keep the cable from wearing out, rope or cable from wearing out or becoming impaired. Now I am not inclined to take the view under the testimony that the duty of making these repairs or these alterations or adjustments, whatever they may be called, rested upon the crew of which Mr. Witkouski was foreman. His duties were of an entirely different character. The hoist was simply being used as an instrumentality. He was not in charge of the hoist, in the sense that he

was responsible for keeping it in repair. It is true that the hoist man was subject to his direction for certain purposes, but only for certain purposes. If it be argued that some of the testimony tends to show that the hoist man was entirely under his control, subject to discharge by him, the weight of the testimony I think is clearly to the effect that he was not subject to be discharged by the pusher or foreman of this crew, that if his service in operating the hoist was unsatisfactory, he would be reported to the foreman or superintendent, and it would be for the foreman or superintendent to say whether he should be discharged or transferred or retained in that particular service. It is quite possible that for various reasons the hoist man might not be satisfactory to the crew, and in the operation of the mine the foreman might believe that he was a competent and efficient man, and still, in order to preserve harmony, might transfer him to some other hoist or set him at some other work, or discharge him entirely. I think that the testimony pretty clearly shows that such were the relations between these parties, and under this rule it seems to have been the duty of the mechanical department to take care of these hoists and to see that they were put in proper repair. Now if the testimony isn't conclusive, at least there is sufficient to require that the question be submitted to the jury, as to whether or not the hoist man, as to this particular condition or defect, was delegated by the mechanical department to remedy it or make the necessary repairs. My impression is, from the

testimony, that such was the understanding, that when the slack occurred in this cable or rope, the instructions from the mechanical department went to the hoist man to see that it was rewound or readjusted to the drum, in order to avoid unnecessary wear and perhaps impairment. Now, to do that it became necessary, as is suggested, to loosen this screw. It wouldn't have been necessary to loosen that screw if the drum shaft had not been sprung and had not been in a defective condition, as I understand the testimony. In other words, the mechanism was such that upon releasing the clutch lever the clutch would be disengaged entirely from the drum shaft, but because the shaft was sprung, as the drum revolved it would come into contact with the clutch at one point in the course of each revolution, and thus it would offer some resistance to the revolution of the drum. In that view, gentlemen, I think I shall have to adopt the conclusion that in readjusting the rope or cable for that purpose, in loosening this screw, and in leaving the clutch in that loosened condition, without advising the succeeding crew, the preceding crew was acting as the representatives of the master, as the representatives of the mechanical department, in the performance of a non-delegable duty or obligation, and that therefore the deceased would not be chargeable under the principle of the fellow servant rule. That being about the only question, as I understand, upon which counsel for defendant relies for a non-suit, the motion will be denied.

MR. WAYNE: We reserve an exception to the ruling.



THE COURT: Yes.

MR. WAYNE: If Your Honor please, I have quite a large number of witnesses. I don't know whether you want to go on tonight. I have some eleven or twelve witnesses. I don't suppose we can get through with them.

THE COURT: I think we had better go on tonight. Other parties and witnesses are waiting here, and we are a little behind, and I think we would better put in some time at any rate, even though we are unable to get through. Seven o'clock, gentlemen.

An adjournment was accordingly taken until 7 P. M., Friday, Nov. 24, 1916.

*7 P. M., Friday, Nov. 24, 1916.*

MR. WAYNE: If Your Honor please, and Gentlemen of the Jury, just briefly I desire to state to you at this time what the defendant's defense is in this case.

We will show you that on the night of this accident, and for some months before that time, three shifts had been working in that shaft, sinking it. It was a shaft that was in course of construction. That in lowering materials and men, and in hoisting them up, the company used a hoist which it had moved some time in the Month of March from what was called the old shaft, down to this new shaft which they were sinking. We will show you that this particular hoist is what is known as a Lake Superior hoist, made by the Lake Superior Machinery Company, at Marquette, Michigan; that it was put out, manufactured in 1914, and had been in use at the mine



very little over one year; that the hoist in question was in good condition at this time. You have already seen the photographs and had a sufficient description of the hoist to know the manner in which it was operated and the manner in which it did its work.

Witkouski, who met with the accident, was the boss of the night shift crew, consisting of four men besides himself, one hoist man, Witkouski himself, and three other men. That during the shift before Witkouski was injured, which was the day shift, and the pusher of boss of which was Jonas Jacobson, they had felt it necessary to take the kinks out of the cable that was wound around the drum of this shaft; that it was customary and proper and always done in a case of that sort, to release the clutch by turning the nut on the end of the clutch bolt, the reason for that being to release the friction of the clutch on the shaft of the drum, so that the men in taking hold of the cable with their hands and pulling it off the drum, would not have to pull against the additional friction of that clutch, and that upon this particular occasion Jacobson's crew did this; that after unwinding the cable they started in to rewind it, but eleven o'clock came before they were finished, and eleven o'clock was the time the shift changed.

Pausing at this point for a moment, we will show you that during the time Witkouski worked there that he was familiar with that hoist, that on not one or two, but on many occasions, when Egbert, the hoist

man, working under him, would be sent by Witkouski to some other place in the mine to get any materials that Witkouski wanted himself or his men to use, that he, Witkouski, would take this hoist himself and operate it during the absence of Egbert, and that he was perfectly familiar with the hoist and with the operation of the hoist, and with whatever its condition was at the time of the accident. That on this particular evening, when he went to work with his crew and saw that they were still rewinding this cable, he told Jacobson and his men to leave and go off shift, that he and his men would finish the job of rewinding this cable; that the Jacobson crew then did go off shift, and that Witkouski and his men rewound the few coils of cable that had not yet been wound upon the spool or drum of the hoist. That Witkouski then, with his three men, loaded the bucket with lagging, as has been testified to, and the men got on the hoist and started down. That, as the hoist engineer has already testified, he noticed the hoist was descending more rapidly than he desired it to, and that the reason for it was that the nut on the end of the clutch bolt had been loosened, by the engineer who preceded him. That immediately he applied his brake, that he applied it just as quickly as he could, consistent with a desire on his part and a purpose on his part to stop the hoist gradually, so that the danger of breaking the cable or of stopping it so suddenly as to jar the men off the rim of the bucket would be avoided. And it is already, I think, in evidence that the men who stayed in the bucket were saved.

This in brief is the defense.

We will show you that the hoist engine was in perfect condition all of this time, and that the only thing which caused the hoist to descend rapidly at all was the act of the preceding engineer in loosening that nut on the clutch bolt.

MR. PLUMMER: At the close of the opening statement of counsel for the defendant, the plaintiff moves the court to direct a verdict for the plaintiff, on the ground that if all of the statements made by counsel for the defendant are true, or if any of them are true, that said statements do not state a defense or a legal rebuttal of the evidence offered by the plaintiff.

THE COURT: The motion is denied.

MR. PLUMMER: We take an exception.

MR. WAYNE: If Your Honor please, might I have some indication as to how long you intend to continue tonight? I have one or two witnesses that I dislike to call out of order, but they do want to get away on the morning boat, and I will act accordingly, if I know how long—

THE COURT: Somewhere between an hour and a half and two hours.

MR. WAYNE: Very well. I will call Mr. Gregory.

SHERMAN GREGORY, produced as a witness on behalf of defendant, being first duly sworn, testified as follows:

MR. WAYNE: I desire at this time to offer in evidence Exhibits one to seven inclusive.

MR. PLUMMER: Is that the photographs?

MR. WAYNE: Yes.

MR. PLUMMER: I assumed that they were in. They can be, as far as I am concerned.

MR. WAYNE: Q. State your name?

A. Sherman Gregory.

Q. Where do you reside?

A. Interstate mine.

Q. You are employed there, are you?

A. Yes, sir.

Q. How long have you been employed at the Interstate?

A. About seventeen months.

Q. And what is your position at the present time?

A. Surveyor.

Q. Are you acquainted with Mr. Lytton?

A. Yes, sir.

Q. Who testified here today?

A. Yes, sir.

Q. Were you working at the Interstate mine at the time Witkouski met his accident, on the 18th day of last May?

A. I was.

Q. I will ask you to state whether or not you had any conversation with Lytton a few days after the accident?

A. I did.

Q. How many days after the accident was it, as near as you can remember?

A. Probably about ten days. As I remember, it was two or three days before Mr. Lytton left

there, and, as I remember, he left on the first of the month.

Q. Where did you have this conversation with him?

A. In the hoist room.

Q. Who was present?

A. There was no one except Mr. Lytton and I.

Q. What was the conversation?

MR. PLUMMER: I object to that, if Your Honor please. The foundation for impeachment must state in specific terms just what was said.

THE COURT: Sustained. You must put to him the question which you put to the other witness.

MR. WAYNE: Very well.

Q. I will ask you to state if, at that time and place, you had a conversation with Mr. Lytton in substance and effect as follows: You asked him if he knew how the accident happened to Witkouski, and if Lytton did not at that time point out the nut upon the clutch bolt and state to you in substance and effect that he had loosened that nut?

MR. PLUMMER: We object to that as irrelevant and immaterial, and not a question asked of Mr. Lytton as an impeaching question at all. He asked him if that was what he told Mr. Gregory about Witkouski's knowledge of the condition.

MR. WAYNE: This is part of the question asked him.

THE COURT: This is merely preliminary, I understand?

MR. WAYNE: Yes.



THE COURT: This of itself is unimportant, of course.

A. He did point out to me, not, that it had been loosened, but there was nothing said, as I remember, as to who loosened the nut.

Q. Will you state if at that time and place you then did not ask Mr. Lytton in substance and effect whether or not Mr. Witkouski knew that that nut had been loosened, and if Lytton did not then state to you in substance and effect, "Yes, he knew, because I told him so."

A. Yes.

Q. That is the conversation as you remember it?

A. Yes. And there was a few more words said when I left.

Q. What were the few words?

MR. PLUMMER: I object to that.

THE COURT: Sustained.

MR. WAYNE: Q. Now, Mr. Gregory, have you prepared a plat or map at my request, showing this hoist.

A. I have, yes.

Q. And it is made true to the dimensions of the hoist?

A. Approximately, yes.

A certain paper was thereupon marked DEFENDANT'S EXHIBIT NO. 8.

Q. Exhibit 8, which I show you, is the map or plat which you have made, is it not?

A. Yes, sir; that is a cross section.

Q. Now, Mr. Gregory, will you step over here?



Will you indicate upon the exhibit, Defendant's Exhibit No. 8, where the drum of the hoist is?

A. This dotted line. This is looking right into the hoist. This dotted line is the drum of the hoist, on which the rope went.

THE COURT: Perhaps you would better just explain to the jury that that is a cross section.

A. This is a cross section looking at the end of the hoist, right through the station, as though you stood and looked right into the station and down, looking right against the end of the shaft.

Q. The end of the hoist that you refer to is the end where the clutch is, is it not?

A. Yes, sir.

Q. And you are looking towards that end?

A. Right into the clutch.

Q. Where is the shive wheel?

A. Here is the lower shive wheel. The top of the upper one is about sixty-five feet above the floor of the station.

Q. Now the dotted or etched line that you have down the shaft, what is that?

A. I have tried to show here the cross head connected to the bucket by a chain; these dotted lines here are the chains, dotted because they are back of the guides.

Q. What are the cross pieces shown in the shaft?

A. These are the centers or dividers.

Q. How many compartments were there in that shaft?

A. Three.

Q. And down which of those compartments did the bucket run?

A. The center one.

Q. Will you indicate to the jury the clutch, upon this exhibit?

A. This dark line is the clutch band; here is one end and here is the other.

Q. The ends are indicated by the—

A. Some circles there.

Q. Circles?

A. Yes.

Q. Will you indicate to the jury where the clutch bolt is?

A. It is this bolt from this end of the hoist to this bearing right here. This is fixed, held in place, by three bolts, and this bolt goes through, with the big nut on the end, and this end controls the clutch, this collar, that slides in and out on the shaft, and it lengthens this arm here, attached to the end of the clutch band.

Q. And when the clutch lever is pulled back it tightens the clutch band, does it not?

A. Yes, that is the way it works.

Q. When did you make this map, Mr. Gregory?

A. I was working on it, on this one with another one, for two days before we came down here.

MR. WAYNE: Take the witness.

CROSS EXAMINATION by

MR. PLUMMER:

Q. What is your official position with the Callahan Company?

A. I am surveyor.

Q. Surveyor?

A. Yes, sir.

Q. And what position did you hold at the time this conversation you said occurred between you and Mr. Lytton took place?

A. I was sampler and surveyor's helper.

Q. Surveyor's helper?

A. Yes, sir.

Q. Then how long was it after you had this conversation with Mr. Lytton that you told any of the officers of the company with reference to that conversation, if at all?

A. Well, immediately.

Q. Immediately?

A. Yes, sir.

Q. And since that time you have been promoted to your present position?

A. Yes, sir.

Q. You had nothing to do with that particular shaft, did you?

A. No, sir.

Q. Or those men?

A. No, sir.

Q. Did you have anything to do with Lytton?

A. No, sir.

Q. Did you have anything to do with Witkouski?

A. No, sir.

Q. Or his men?

A. No, sir.

Q. What was you doing in there at the time?

A. You misunderstand me. I didn't say I was in there at the time of the accident.

Q. You say the bolt was pointed out to you by somebody?

A. Yes, sir.

Q. You was in there when it was pointed out to you. What was you doing there then?

A. If I may explain—

Q. Just answer my question.

THE COURT: No. He may explain.

A. My position at that time was to go all over the mine, which I do every day, and did at that time.

Q. For what purpose do you go over the mine?

A. Pardon me?

Q. For what purpose did you go over the mine?

A. Because Mr. Lytton asked me to.

Q. What was you to do over at the mine?

A. To see how things were going on and report to Mr. Newton.

Q. What things?

A. Everything.

Q. Machinery?

A. If I noticed anything wrong, yes.

Q. You was a surveyor's helper at that time, you say?

A. Yes, and sampler.

Q. Did that require you to go around and look at the machinery and how they was doing the work?

A. I probably went down the shaft right after that. I either went down or had been down the shaft.

Q. Did your position as surveyor's helper, and

your duties incident to the office of surveyor's helper and sampler, require you to go around and see how the machinery was and have it adjusted, and talk with the machinists and men?

A. It was merely my interest in the case.

Q. What case?

A. This particular accident, yes.

Q. Why was you interested in that accident any more than the usual sympathy that you would have for a person killed, or his family?

A. I wasn't.

Q. You said you were there on account of your interest.

A. Merely interested personally.

Q. Why was you interested—looking up evidence for the company?

A. No, sir, I was not.

Q. Why did you ask Lytton about it at all?

A. To satisfy my pure curiosity, is all.

Q. Why was you interested in ascertaining whether or not Witkouski knew anything about it?

A. Because the remark had been made that Mr. Witkouski was always in such a hurry, he was rushing everything, and it was hurry, hurry, hurry, all the time.

Q. And as a matter of fact, everybody else was in a hurry, wasn't they?

A. Perhaps.

MR. WAYNE: I object to that as not proper cross examination.

MR. PLUMMER: Q. Well then, that couldn't have been the reason, could it?

MR. PLUMMER: This is cross examination.

THE COURT: Proceed.

MR. PLUMMER: Q. Everybody else was in a hurry, weren't they?

MR. WAYNE: I object to that as not proper cross examination and immaterial.

THE COURT: What do you mean by everybody else was in a hurry?

MR. PLUMMER: All right then.

Q. Then if everybody else was in a hurry, and Witkouski was in a hurry with the rest of them—

THE COURT: I said, what do you mean by everybody else in a hurry?

MR. PLUMMER: I mean the pushers and foremen, and the people who were getting the ore out, generally. I want to show that if everybody else was in a hurry the way Witkouski was—

THE COURT: He didn't say Witkouski was in a hurry.

MR. PLUMMER: He said the remark had been made that he was.

Q. The remark being made that Witkouski was in a hurry, you say that was what excited your interest, to ascertain whether or not he knew about this being loose?

A. Yes.

Q. And then you went and asked Lytton about it?

A. I did.

Q. And then you immediately reported it to the



company, for their benefit in case of a law suit, didn't you?

MR. WAYNE: I object to that.

MR. PLUMMER: I have a right to show his interest in the case.

MR. WAYNE: It doesn't show interest.

THE COURT: The objection is sustained. The question is objectionable, the form of the question.

MR. PLUMMER: Q. You say, don't you, that as soon as you found out through Lytton that Witkouski knew about this being loose you immediately went and reported to who?

MR. WAYNE: That is repetition.

MR. PLUMMER: I say to who. It isn't repetition.

MR. WAYNE: He has already said that; he said Mr. Newton.

MR. PLUMMER: What position does Mr. Newton hold?

A. He is general superintendent.

MR. PLUMMER: That is all.

RE-DIRECT EXAMINATION by

MR. WAYNE:

Q. Mr. Gregory, everybody else is interested—

MR. PLUMMER: We object to that as leading and suggestive, if Your Honor please.

MR. WAYNE: Wait until I ask the question.

THE COURT: Sustained.

MR. WAYNE: Q. State whether or not it is a fact that when a man is killed in a mine, that every-

one around the mine is interested in finding out how he came to have the accident?

MR. PLUMMER: We object to that as leading and suggestive, if the court please.

THE COURT: Overruled.

A. Yes, to the best of my belief and knowledge, it is.

Q. And you were interested in finding out how this accident happened?

A. Yes, sir.

Q. Mr. Gregory, was your promotion to your present position due in any way to this Witkouski accident?

A. It was not.

MR. WAYNE: That is all.

RE-CROSS EXAMINATION by

MR. PLUMMER:

Q. Then your interest, in conjunction with the usual interest which you say they all manifest there and have there, to ascertain how a man got killed, your interest then was simply to find out how he got killed?

A. It was, yes, sir.

Q. And you found out that he was killed by falling in some way down the shaft, didn't you?

A. Yes, sir.

Q. And you found out that that was due to some slip of this clutch or something, didn't you?

A. Yes.

Q. And that was all you cared to know, was how he got killed, wasn't it?

A. Yes, to know what that bolt was—

Q. Then you wasn't interested as to what he knew about the condition—

THE COURT: You must be fair with the witness. Your manner is somewhat objectionable, Mr. Plummer; I shall have to caution you against it.

MR. PLUMMER: Q. Then the only thing you was interested in was as to how he got killed, and you found out how he got killed, as I say, by falling down the shaft.

A. Well, I knew that.

Q. And it was on account of some slip in the machinery somewhere?

A. Yes, sir.

Q. And you wasn't interested in finding out how much he knew about machinery, were you?

A. If you will allow me, I will tell you—

Q. Please answer my question.

MR. WAYNE: The witness is answering the question. Go ahead, Mr. Gregory.

THE COURT: Proceed. Answer the question.

MR. PLUMMER: Will you read the question, Mr. Reporter.

(Question read.)

A. May I ask you who you mean by "he"?

Q. Witkowski.

A. I don't know just how to answer. The reason I asked, they had remarked, you know, or said, that the clutch had slipped, and I didn't know just exactly before this accident happened what they had loosened. I understood that something had been loosened,

and it was with that incentive that I went to Mr. Lytton and had him point out to me this nut, and when I went in he turned this hoist over and showed me exactly the nut that was loosened, and then followed the conversation that I had with him.

Q. Then after Lytton had shown you what had been loosened up and what caused the accident, that was as far as you had any interest in it, wasn't it?

A. Yes, it was just to satisfy my own interest.

Q. If that was all the interest you had in it, why did you ask Mr. Lytton with reference to Mr. Witkouski's knowledge of the condition?

A. Let me be sure I understand you.

MR. PLUMMER: That is all, sir.

THE COURT: Read the question to him.

(Last question read.)

A. Merely because I was wondering if Mr. Witkouski had forgotten that this nut was loosened, and got on the cage without tightening it.

Q. Well, that was the first time, however, that you knew that he knew anything about it, wasn't it, and therefore you couldn't have done it for the purpose of finding out whether he had forgotten?

MR. WAYNE: I think the answer of the witness is perfectly plain and clear, Your Honor.

THE COURT: No. He may answer.

A. It has been stated, Mr. Plummer, that the general understanding is—

MR. PLUMMER: Q. I didn't ask you what the general understanding is.

THE COURT: Yes, Mr. Plummer, you asked him

for his reasons for doing this. You can't require him to answer in a certain way. You must be fair with the witness.

MR. PLUMMER: I understood my question to be if that was the first time that he knew that Witkouski knew anything about it, and didn't know anything about Witkouski's knowledge up to that time, then how did he think that Witkouski might have forgotten.

THE COURT: Yes, but your questions are couched in such a way as to entrap the witness. I am not satisfied that you are endeavoring to permit the witness to speak the facts as he understands them.

MR. PLUMMER: I don't want to be unfair with the witness, Your Honor.

THE COURT: Your questions impress me as indicating an intention to be unfair with him.

MR. PLUMMER: If they do, I apologize to the court. I don't intend to.

(Question read.)

A. It was because it was the—I understood that this was the customary thing, to loosen this nut when the cable was to be re-wound, and I also understood that the pushers in that shaft were in charge of the hoist men and in charge of those men there working in the shaft, and for that reason I asked Mr. Lytton if Mr. Witkouski didn't know this, just to satisfy my own curiosity and to see who, in my own mind,—if anybody was to blame, and that was

my sole incentive in asking that question and in having the conversation I did with Mr. Lytton.

MR. PLUMMER: That is all.

RE-DIRECT EXAMINATION by

MR. WAYNE:

Q. It was just a casual conversation, was it?

THE COURT: No. That is leading.

MR. PLUMMER: That is leading.

MR. WAYNE: That is all, Mr. Gregory. Mr. Egbert.

JOE EGBERT, a witness heretofore duly sworn on behalf of plaintiff, upon being recalled in behalf of defendant, testified as follows:

DIRECT EXAMINATION by

MR. WAYNE:

Q. Mr. Egbert, will you state to the jury what was the condition of this clutch on the day Witkouski was injured, or the day he met with his accident?

A. Well, the day before I was using it all day, and it was O. K., and that night it was—that was all I was using it.

Q. Now, after the accident, will you state what, if anything, you did to the hoist engine before you went off shift?

A. I tightened the clutch up. I tightened the bolt.

Q. You tightened the one bolt?

A. Yes, sir.

Q. State whether or not that was the only thing you did, before you went off shift.



A. That is the only thing until we went off—never finished the shift.

Q. After the men came up, after the accident, the whole crew went off shift, did they not?

A. Yes, sir.

Q. They didn't work the balance of the shift?

A. Not that shift.

Q. Will you state to the jury what is the fact as to whether or not Witkouski had been running that hoist?

A. Any time he send me away for powder—

MR. PLUMMER: I object to that as not responsive.

THE COURT: I really didn't understand the answer.

(Last answer read.)

MR. WAYNE: He had just started the answer.

MR. PLUMMER: He can answer the question yes or no.

THE COURT: You can answer that yes or no.

A. He run it.

MR. WAYNE: Q. And on what occasions would he run the hoist?

A. Any time he sent me away.

Q. And were those occasions frequent or otherwise?

A. Every time we blast.

Q. How often did you blast?

A. Well, sometimes for two weeks straight.

Q. Every day, you mean?

A. Yes, sir, for two weeks straight.

Q. Did you blast more than once a day?

A. No; in twenty-four hours one shift blast, one shift muck, and one shift was drilling.

Q. And at all of these times when you blasted Witkouski run the hoist?

A. Well, he possibly don't run it much. He made possibly one trip or two. I was away for ten minutes or so, I believe. It was quite a ways down to the powder magazine.

Q. Will you state what is the fact as to whether or not the shaft on this drum was sprung?

A. I never noticed it. To tell the truth, I never noticed it, and nobody pointed it out to me neither.

Q. You I think said that you had been using it ever since for about two months?

A. For two months on the new shaft.

Q. And during that time you had never noticed any springing of the shaft on the drum?

A. I didn't notice it.

MR. WAYNE: Take the witness.

CROSS EXAMINATION by

MR. PLUMMER:

Q. During the time that Mr. Witkouski used the hoist on these trips you speak of, while you was away after powder, the clutch was tightened up then, wasn't it?

A. Well, yes.

Q. It worked all right, didn't it?

A. Worked all right.

MR. PLUMMER: That is all.

RE-DIRECT EXAMINATION by

MR. WAYNE:

Q. Will you state what is the fact as to whether or not Witkowski's shift had ever rewound this cable?

A. We re-wound it once before; our shift re-wound it once.

Q. State what, if anything, you did with the clutch, when you re-wound it that time.

A. You see it went very hard without loosening the bolt, and Mr. Hughes, master mechanic, was present, and we loosened the bolt, and when we start to re-wind he tighten it.

MR. WAYNE: That is all.

RE-CROSS EXAMINATION by

MR. PLUMMER:

Q. This other time that this same shift assisted in rewinding the coil, that you speak of, how long was that before the accident?

A. The cable was on the drum only I believe a week or so.

Q. About a week or so before the accident?

A. Yes, new cable.

MR. PLUMMER: That is all.

MR. WAYNE: That is all, Mr. Egbert. Mr. McDonald.

NORMAN McDONALD, produced as a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. WAYNE:

Q. Your name is Norman McDonald?

A. Yes, sir.

Q. Where do you live?

A. Interstate.

Q. What is your position at the Interstate-Callahan mine?

A. Foreman.

Q. How long have you been foreman?

A. About twelve months.

Q. You were foreman during the month of May of this year?

A. Yes, sir.

Q. And you were acquainted with Charles Witkouski, were you?

A. Yes, sir.

Q. Mr. McDonald, were you at and in the mine the day when Witkouski met with his accident?

A. Yes, sir.

Q. Were you in there after the accident?

A. Yes, sir.

Q. About what time?

A. About eight o'clock the next morning.

Q. Who was with you at the time?

A. Charlie Mead was with me.

Q. What position did he take at that time?

A. Hoist man.

Q. On this same hoist?

A. Yes, sir.

Q. I will ask you to state to the jury whether or not, that morning after the accident, you made any examination of the hoist?

A. I looked it all over.

Q. Will you state whether or not there was anything out of repair in the hoist?

A. Not that we could find.

THE COURT: When was that,—the morning of that day?

A. Yes.

MR. WAYNE: Egbert testified that he went off shift and left it, and the only change he made in it was to tighten that nut, and then he went off shift.

Q. Will you state whether or not you at that time examined the clutch?

A. Yes, we looked it over.

Q. What condition was it in?

A. Good order.

MR. PLUMMER: If Your Honor please,, I think I shall object to that answer as simply being general. We tried to prove that it was in bad order, and counsel objected on the ground that that was a conclusion and a matter for the jury to determine. I think it would be the same thing on this answer here.

THE COURT: Would there be any other way of proving the affirmative? Of course, in proving the negative it wouldn't be sufficient to say that it was merely in bad order, but you would have to point out the respect in which it was in bad order. If it was in good order, that would cover all respects, wouldn't it?

MR. PLUMMER: I presume so; it probably would.

THE COURT: If you want to call his attention to anything you can do so on cross examination.

MR. WAYNE: Q. Will you state whether or not you found that the shaft on the drum had been sprung?

A. Not to my knowledge, and nobody ever reported it to me.

Q. What, after you examined the hoist, did you and Mr. Mead do in the way of experimenting with it?

A. I first sent for the master mechanic; I sent outside for the master mechanic.

Q. That was Mr. Hughes?

A. Mr. Hughes. We then took and loaded the bucket up with machines.

Q. What kind of machines?

A. Mining machines, weighed about a hundred pounds.

Q. Apiece?

A. Yes.

Q. Do you remember how many you put in?

A. Five, I believe.

Q. All right. Then what did you do?

A. I told Mr. Mead to lower the bucket down and run it up and down the shaft, and try the levers, and see if everything was in good order, which he did.

Q. In what manner did he run the bucket up and down the shaft?

A. He dropped it down with the clutch, and threw it in and pulled it out, tried the brake and the clutch, pulled it up and set it down,—several different ways to try it.

Q. By these experiments, will you state to the



jury whether or not you found anything wrong with the hoisting apparatus, either the hoist itself, or the clutch?

A. Nothing that we could find.

Q. Will you state what is the fact as to whether or not that hoist had remained in the same condition since that accident?

A. There has been no particular repairs done on it since.

Q. You have put an additional cable of some sort up to the cross head, haven't you?

A. That wouldn't be the hoist, though.

Q. The hoist itself has not been changed. Mr. McDonald, on these shaft crews that were working there at the time, how many men were there in each crew?

A. Four men and a hoister.

Q. Who wae the boss of the crew?

A. Witkouski, Jonas, and the other fellow's name I can't just remember.

Q. It was the pusher, whoever it was?

A. The pusher, yes.

Q. What is the fact as to the power and authority of the pusher of the shaft crew over the hoist engineer? What power or authority does he have over him?

A. He has full charge over him.

Q. What, if any, authority, has he to discharge the hoist man?

A. Yes, sir.

Q. Well, has he or has he not?

A. He has.

MR. WAYNE: You may take the witness.

CROSS EXAMINATION by

MR. PLUMMER:

Q. How did you happen to examine this hoist after this accident occurred, the next morning?

A. Well, it was very proper for us to look it over after an accident.

Q. Did you ascertain that it was due to the condition of the hoist that caused the accident?

A. Mr. Mead, the hoist man, wouldn't work until he sent for me; he wouldn't do nothing.

Q. That isn't answering my question, Mr. McDonald.

THE COURT: Read the question.

(Question read.)

THE COURT: That would be immaterial.

Mr. PLUMMER: Just to show his motive, as to whether or not he did.

THE COURT: Well, he has answered the question as to why he did.

MR. PLUMMER: Q. Who do you say it was that wouldn't work until you—

A. Mr. Mead, the hoist man.

Q. The following man?

A. The following man.

Q. Did he give you any reason why?

A. Well, I suppose after the accident he wanted to be sure that everything was all right, before he would start.

Q. My question is, did he tell you about any reason why?

A. No.

Q. You went then and looked the hoist all over?

A. Yes, sir.

Q. And it was all in good running shape at that time?

A. Yes, sir.

Q. So that it would hoist?

A. Yes.

Q. And lower people down?

A. Yes.

Q. This bolt or nut that we have spoken of here, that was tightened up then, wasn't it?

A. Yes, sir.

MR. PLUMMER: That is all.

RE-DIRECT EXAMINATION by

MR. WAYNE:

Q. What is the custom there with regard to this clutch bolt at times when a crew would be winding or unwinding the cable?

THE COURT: That is, if you know anything about it, of your own knowledge.

A. They used to loosen the clutch in order to let the spool reverse freely.

MR. WAYNE: That is all.

RE-CROSS EXAMINATION by

MR. PLUMMER:

Q. Did you see them do that?

A. Yes, sir.

Q. How long before this accident occurred?

A. Probably two days.

Q. Two days?

A. Yes.

Q. What engineer done that,—I mean the hoist man?

A. I just don't remember which one.

Q. And then it was tightened up again before they would try to use it to let men down?

A. Yes, sir.

Q. What was the object of loosening this?

A. To let the spool revolve freely from the rest of the hoist.

Q. Wouldn't that revolve freely if you disconnected the clutch, in other words, threw it out of gear?

A. No, sir.

Q. Isn't it the purpose of the clutch to throw the machine in gear, isn't that the object of it?

A. Yes, sir.

Q. And when you throw the clutch out, that throws it out of gear?

A. Out of gear.

Q. What is there then that retards the movement of the—

A. She appeared to fit tight so that you couldn't pull it off by hand.

Q. Do you know what made it fit tight?

A. No, I don't.

MR. PLUMMER: That is all.

RE-DIRECT EXAMINATION by

MR. WAYNE:

Q. It was made to fit tight, was it not, Mr. McDonald?

MR. PLUMMER: That is objected to as leading.

THE COURT: Sustained.

MR. WAYNE: Q. What is the fact as to whether or not the clutch offered some resistance even when it was thrown out?

A. Well, it might touch in certain parts as it would run and make it pull, the friction on it would cause it to pull.

Q. What kind of a lining did this clutch band have?

A. Belting or asbestos.

MR. WAYNE: That is all.

RE-CROSS EXAMINATION by

MR. PLUMMER:

Q. You say it might catch on certain parts of the drum. What parts do you mean?

A. Parts under the band.

Q. What would make it strike some parts and not others?

A. Well, the band might just happen to lay, not be perfectly on the same circumference as the drum, and might cause it to touch.

Q. If it had been looser you wouldn't need to unscrew this thing at all, would you, to operate this drum, if the clutch was thrown out?

A. If it was loose enough, yes, it wouldn't need to, no.

MR. PLUMMER: That is all.

MR. WAYNE: That is all. Mr. Mead.

CHARLES MEAD, produced as a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. WAYNE:

Q. State your name?

A. Charles Mead.

Q. Where do you live?

A. Callahan-Interstate.

Q. Are you employed there?

A. Yes, sir.

Q. In what capacity?

A. Hoist man.

Q. How long have you been employed as hoist man?

A. At the Callahan?

Q. Yes.

A. Since the 14th of April.

Q. Of this year?

A. 1916.

Q. On what hoist are you now working?

A. What is known as the new shaft.

Q. That is the hoist we have been talking about, is it not?

A. Yes, sir.

Q. When did you go to work on that hoist?

A. On the 14th of April, 1916.

Q. What shift were you working on at the time Witkouski was injured?

A. I was on the day shift.

Q. You had taken Hare's place, had you not?

A. Yes, sir.

Q. Now, the day shift goes on shift at what time?

A. Seven o'clock.



Q. In the morning, and works an eight hour shift?

A. Yes, sir.

Q. What was the condition of this hoist the last shift you worked before Witkouski was killed?

A. It was in good condition.

Q. What was the condition of the clutch at that time?

A. It worked just the same as it had since I started there on the 14th.

Q. How did it work?

A. The way it was supposed to work.

MR. PLUMMER: I move to strike the answer out, as not responsive and simply a conclusion of the witness as to how it was supposed to work.

THE COURT: Well, did it work perfectly or imperfectly, is the question.

A. It worked perfect, the same as it had all the time that I was on the engine.

Q. Had you ever had any trouble with the hoist?

A. No, sir.

Q. Now then, will you state whether or not you worked the day shift after Witkouski was injured?

A. I did.

Q. You did?

A. Yes, sir.

Q. And you went to work at the usual time that morning?

A. Yes, sir.

Q. And who went with you?

A. The shaft crew.

Q. Anyone else?

A. No, just the shaft crew; we went in first.

Q. State whether or not Mr. McDonald and Mr. Hughes came in shortly after that?

A. They came in about eight o'clock.

Q. Had you examined the hoist in the meantime?

A. I looked it over.

Q. What, if anything, did you find with reference to the condition of the hoist?

A. I found nothing wrong.

Q. And what, if anything, did you find with reference to the condition of the clutch?

A. I found nothing at all.

Q. The same as it had been?

A. The same as it had been.

Q. Now, when Mr. McDonald and Mr. Hughes came in, will you state to the jury whether or not you made any tests or experiments to see whether or not the hoist was in good condition?

A. Mr. McDonald looked the hoist over, and he told the shaft man to throw these five machines in the bucket.

Q. Then what did you do?

A. He told me to try it.

Q. How did you try it? Just explain fully to the jury.

A. I let her down on the release to see that the clutch was tight enough to hold.

Q. What was the fact as to whether or not it was tight enough to hold?

A. It did hold.

Q. And in what manner did you run the bucket up and down the shaft?

A. I let it down on the clutch, and then I threw out the clutch and let her down on the brake.

Q. How did the brake work?

A. The brake held the machines, held everything.

Q. At what speed would you say you run it up and down?

A. I let her down on the release, let her go free, with the brake off.

Q. Will you state whether or not these tests and experiments disclosed anything wrong with the hoist?

A. They did not.

Q. You have been working there with that hoist ever since?

A. Yes, sir.

Q. And are now?

A. Yes, sir.

Q. Will you state whether or not there have been any changes made in the hoist?

A. Not at any time that I have been on shift.

Q. State whether or not there are any changes that have been made that you have seen or noticed?

A. New brake blocks, occasionally.

Q. You have to put new ones in occasionally?

A. Yes, sir.

Q. There have been no changes in the machinery itself?

A. Not that I know of.

Q. Who was your pusher at that time?

A. Ole Hoke, I think his name was.

Q. What supervision, if any, did the pusher use to exercise over you, the hoist man?

A. If he was in a hurry and wanted anything from down at the repair shop in the tunnel, I would go and get it, if he wanted me to.

Q. Who would run the hoist while you were gone?

A. She wouldn't run; we would let her stand.

Q. What, if you know, was the authority of the pusher, as far as discharging the hoist man was concerned?

A. Well, I think he could do it if he wanted to.

Q. That was the opinion that you had while you worked there?

A. Yes, sir.

MR. WAYNE: Take the witness.

CROSS EXAMINATION by

MR. PLUMMER:

Q. He never discharged you, did he?

A. No, sir.

Q. You never saw him discharge anybody else, did you?

A. No, sir.

Q. You never saw him hire anybody, did you, to run the hoist?

A. No, sir.

Q. As a matter of fact, you understood his duties and authority to be this, that as far as hoisting up materials and lowering down materials or men, he would give you signals when to lower them and when to hoist them?

A. Yes, sir.

Q. And at times he has requested you to go and get different things, and you have done it?

A. Yes, sir.

Q. You didn't feel, did you, that if you hadn't complied with that request to go and get these things he could discharge you for it?

A. No, I don't know as I did.

Q. You didn't think he could, did you?

A. I didn't know about his authority. I was given to understand that he had charge of that work, when I went to work.

Q. When you say work, you mean work down the shaft, don't you?

A. On his shift.

Q. He didn't ever assume to tell you how to run a hoist or fix your hoist or adjust it, did he?

A. No, sir.

Q. Who did tell you about that, if you was told by anybody?

A. When I needed any information like that I went to the master mechanic, Hughes.

Q. And you got the information from him if you needed it?

A. Yes, sir.

Q. At the time you run this hoist up and down as you have described, with these machines in the bucket, were they?

A. Yes, sir.

Q. This screw that has been spoken of here, that was tightened up, wasn't it?

A. It must have been tightened up, because that was the condition I found it in when I went on shift.

Q. This hoist is of the kind described here, that is, operated with a clutch, and the office of the clutch is to throw it in gear and out of gear, isn't it?

A. Yes, sir.

Q. When it is in gear then it is connected with the engine?

A. Yes, sir.

Q. When it is out of gear there is nothing to retard the unrolling, except the friction of the drum itself on the shaft that it runs on?

A. She is free then.

Q. Free?

A. Yes.

Q. But in this particular hoist, however, it is a fact, isn't it, that it was not altogether free, but there would be more or less friction, which would make it hard to run?

A. That would be in case you wanted to take the rope off.

Q. In case you wanted to pull it by hand, unroll the cable?

A. Yes.

Q. It would be harder to roll than the ordinary hoist?

A. Than the ordinary hoist?

Q. Yes.

A. She run off a little tight.

Q. What was the cause of that?

A. The friction gripped the drum a little.

Q. How many men did it take, when that screw was tightened up, and it wasn't, of course, loosened,



and it would run a little hard, as you have described, when it was in that condition how many men would it take to pull on this cable in order to unwind it by pulling on it?

A. It would take about five, that is, and open the release.

Q. What do you mean by that?

A. That is, release the air out of the cylinders.

Q. I mean when it is out of gear.

A. Yes

Q. Then the requirement of those five men to pull on that cable in order to unroll the spool was on account of this running hard feature that you have spoken of, that is, the extra friction?

A. Yes, sir.

Q. And in order to relieve that friction you loosened this screw you speak of?

A. Loosened the nut.

Q. If it hadn't rolled hard, as you have described, you wouldn't have needed to loosen this screw at all, would you?

A. If it had not rolled hard?

Q. Yes.

THE COURT: You mean if it hadn't been for this friction?

MR. PLUMMER: Yes.

Q. You wouldn't have needed to loosen the screw at all in order to let it run easy?

A. No.

MR. PLUMMER: That is all.

RE-DIRECT EXAMINATION by

MR. WAYNE:

Q. Mr. Mead, what is the fact as to whether or not that clutch was made so that it would cause some friction, even when it was thrown out, unless the nut was loosened?

MR. PLUMMER: I object to that unless he knows what it was made for. Of course this is a mere engineer there.

THE COURT: Yes, I think that question is objectionable. If you desire to ask him how they are generally made, as he has observed them, if he has observed them, you may ask that.

MR. WAYNE: Q. Mr. Mead, how long have you worked on hoisting engines?

A. Not long.

Q. Have you worked on them any other place except the Interstate?

A. Yes, sir.

Q. Where?

A. Well, in different places, different mines, throughout Montana and British Columbia.

Q. What kind of hoists have you worked on?

A. Sinking hoists, the same as this one.

THE COURT: You mean the same make, the same manufacture?

A. No, not the same engine, but the same style of engine.

MR. WAYNE: Q. They are all a good deal alike, aren't they?

A. A second motion engine.

Q. What do you mean by second motion engine?

A. Gear.

Q. The usual hoist in use where you have worked consists of this drum and a shaft on the drum and a clutch, which engages the shaft on the drum, does it not?

A. It does for sinking hoists in small mines.

Q. And for doing the work of sinking a shaft preparatory to making it a working shaft, that is the fact, isn't it?

A. Yes, sir.

Q. What was the custom at these places that you have worked on hoists when they would be unwinding the cable, as to whether or not they would loosen the clutch?

A. I don't know as I ever had occasion to pull a cable off like that.

Q. Do you know what the custom was with regard to this particular hoist?

A. In case of taking the cable off?

Q. Yes.

A. It was customary to loosen that draw bolt.

Q. And will you state whether or not that was understood among the different men who worked on these three shifts?

MR. PLUMMER: We object to this as calling for a conclusion and opinion, if Your Honor please.

THE COURT: Sustained.

MR. WAYNE: That is all.

RE-CROSS EXAMINATION by

MR. PLUMMER:

Q. How often did they take off that cable or wind it on, as you have described?

A. Well, it was a new cable.

Q. This one that was put on at the time of this accident?

A. It was a new cable about a week previous to the accident.

Q. And on account of its being new, that was the reason why they had to slip these loops over it once in a while?

A. Yes, sir.

Q. Was that on account of its being new and not as pliable as an old cable?

A. Being new and more or less spring in the cable.

Q. How long had the cable that was on there before this new one, how long had that been on there?

MR. WAYNE: I object to that as immaterial, if Your Honor please.

THE COURT: Overruled. Answer the question.

A. I can't tell you right the date.

MR. PLUMMER: I don't care about that—just approximately.

A. That cable had been on, I think, about two months.

Q. Then it was substantially about two months apart that they had these operations between—I will withdraw that. I will assume that when the previous cable was put on, for the first few days they had to do the same thing they were doing to this second new cable, for the first few days after that was put on. Do you understand my question?

A. No.

Q. Do I understand this: That the cable that was put on there before this cable they were putting on at the time of the accident, the one you say had been on there about two months before this, when that cable was put on, did they go through the same operation the first few days after that new cable was put on?

A. You mean did they re-wind it, the same as they did the second one?

Q. Yes.

A. No, they didn't.

Q. That didn't require that then?

A. No, sir.

Q. Do you know how long before they was re-winding any cable, before the time when they was re-winding this cable that was on at the time the accident occurred?

A. How long before they rewound the cable previous to this new one?

Q. Yes.

A. Well, they didn't rewind them at all to my knowledge.

Q. No cable at all before that?

A. They weren't taken off and rewound.

Q. I am referring to the kind of work you say these men were doing with this cable when they was re-winding it on this shift which Mr. Witkowski was killed on, and the shift you was on too, did you have to re-wind the cable there?

A. We re-wound the last cable.

Q. On your shift?

A. Once on my shift.

Q. How long was that before the accident?

A. Oh, it couldn't have been over a week.

Q. And how long before that was it that you or the men on that shift had re-wound a cable that was on before this, a previous cable?

A. About two months before, when we put that new cable on; we put it on and left it that way until we took it off.

Q. And when you put that on that went through the same operations,—re-wound it for a few days?

A. No, they didn't.

Q. They didn't?

A. No.

Q. Then it was at least two months?

A. Yes, sir.

Q. Prior to the time this new cable was put on?

A. About that. I aint sure to the date.

Q. Since they had gone through that operation of putting the cable on the drum or re-winding it?

A. About that time, yes.

Q. On the shifts that you worked on on this hoist, were the keys and things tightened up?

A. There was one key in the drum shaft that was loose.

Q. Was that also loose when you were making this test with these machines, lowering them up and down?

A. It was that way when I took hold of it.

Q. After the accident?



A. It was that way before the accident and after the accident.

Q. Is it that way yet? Are you running it yet?

A. I am running it yet.

Q. Is it that way yet?

A. There is a new key in it.

MR. PLUMMER: That is all.

RE-DIRECT EXAMINATION by

MR. WAYNE:

Q. Did the fact that the key was loose interfere at all with the running of the hoist?

A. It didn't interfere with the running of the hoist, no.

Q. Mr. Mead, when was it that you put on this new cable, how long before this accident?

A. As near as I can figure, it was about a week.

Q. And the cable before that had been taken off?

A. Took it off when we put the new one on.

Q. Was there any difference in these cables?

A. The same size.

Q. Will you state whether or not it is usual that you will have to unwind a new cable and take the kinks out of it and re-wind it?

A. You do on a drum of that size, because it is three laps across it.

Q. It was carrying something like nine hundred feet of cable, wasn't it?

A. I think it was more than that.

Q. More than that?

A. Yes, sir.

Q. At any rate, it was three turns or rows across the drum?

A. There was three turns across the drum.

MR. WAYNE: That is all.

RE-CROSS EXAMINATION by

MR. PLUMMER:

Q. Mr. Wayne asked you if this loose key you speak of had anything to do with the operation of the hoist. Just state how it affected the hoist at all, outside of the operation.

A. That key wouldn't affect it at all.

Q. Outside of the operation feature, how did it affect the hoist itself? What did it connect with? What relation had it to the clutch?

A. It keyed the clutch to the drum shaft.

MR. PLUMMER: That is all.

RE-DIRECT EXAMINATION by

MR. WAYNE:

Q. It is a fact, is it not, or state whether or not it is a fact that until that key was actually taken out it wouldn't affect the running of the hoist?

A. It wouldn't affect it, no, because we run it right along from that time until some time in August.

MR. WAYNE: That is all.

RE-CROSS EXAMINATION by

MR. PLUMMER:

Q. It didn't affect it when you run it. You don't know how it affected it when somebody else was running it, do you?

A. No.

MR. PLUMMER: That is all.

MR. WAYNE: That is all. Mr. Kaar.

G. C. KAAR, produced as a witness on behalf of

defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. WAYNE:

Q. Will you state your name?

A. G. C. Kaar.

Q. Where do you live?

A. Wallace.

Q. What is your occupation or official position?

A. I am mechanical engineer for the Coeur d'Alene Hardware & Foundry Company.

Q. They are located in Wallace, are they not?

A. Yes, sir.

Q. Are you a graduate engineer?

A. Yes, sir.

Q. Of what school?

A. The University of Nebraska and the Michigan College of Mines.

Q. When did you graduate from the Michigan College of Mines?

A. In 1909.

Q. And what experience have you had particularly with hoisting machinery?

A. My experience with hoists has been confined to the last three years, with the Hercules people, and the foundry with which I am now connected. We manufacture small hoists.

Q. They deal in hoists, do they not?

A. Yes, sir.

Q. I will ask you to state whether or not you made an examination of the hoist at the new shaft in the Interstate mine, at my request?

A. I did.

Q. When did you make this examination?

A. Last Sunday.

Q. And in whose company?

A. Mr. Hughes.

Q. What sort of a hoist is that, Mr. Kaar?

A. It is a small double cylindered geared hoist, we call it.

Q. By what concern is it manufactured?

A. The Lake Shore people, up at Marquette, Michigan.

Q. How does it differ from other hoists of that type?

A. There is no particular difference. They are practically all alike. They are geared hoists, with a drum. You have to have a drum, and gears to drive the drum, and means to drive the gears.

Q. By what means is this hoist run?

A. By compressed air.

Q. Will you detail to the jury just what examination you made of that hoist?

A. The conditions under which I went up there, if I may state—

MR. PLUMMER: That isn't responsive to the question.

THE COURT: Well, get right to the point as quick as possible.

A. The accident had happened, as I was told when I got to the Interstate, and consequently it was up to me to look over that hoist for those particular parts that might break, as I thought. Naturally,

when a person is in the foundry business, he will look first if it is a casting, or if it is cast steel, or if it is hand forged. The parts which might break are the teeth of the pinion first, or the teeth of the gear which the pinion drives. Then look at the size of the shaft upon which the drum is mounted, the size of the shaft which drives the pinion, the manner in which it is geared, whether it is friction or clutch type of hoist. This is a friction type, and, detailing that, going to the friction, you size up the friction area, the material of which the friction band is made, and the material upon which the friction band is mounted, and how that band is connected with the rest of the machine.

Q. Now, Mr. Kaar, will you tell the jury what examination you made of the clutch and the clutch band.

A. The first thing to interest me was the size of the clutch and the clutch band, in order to determine the surface area, and from that you could estimate the friction per square inch with which the engineer could pull that down upon the ground, and so estimate what that friction surface would hold.

Q. And what is the size of that clutch band?

A. The clutch band is twenty-seven inches in diameter, practically, and the clutch surface of the drum is of course, the same. Around that clutch surface about three-fourths of the circumference is actual lined friction band.

Q. And what is the width of that band?

A. Four inches.

Q. Four inches?

A. Four inches.

Q. And what species of lining has the band?

A. Well, it is Johns-Manville asbestos stuff, that wont burn when it heats up under friction. Everyone uses that.

Q. You say everyone?

A. I don't know just the brand that it is, but all the mining people practically use this asbestos friction lining, which doesn't smoke and burn when the friction is on it. I think it is the same as they use on automobiles.

Q. They use it on the service brake on automobiles?

A. Yes.

Q. That is the exterior brake?

A. Yes, sir.

Q. Mr. Kaar, what examination did you make of the shaft on the drum?

A. Only in general, to see the way the material was distributed in the hoist, that is, was it a large shaft or was it an unduly small shaft upon which the drum was mounted. It was, as I remember, a three and a half or a four inch shaft. From one bearing to another,—that drum, of course, rests in two bearings, and I don't remember exactly how long that shaft was, but not over six feet; and anyone figuring those things,—you have got a beam there that is six feet long, of steel, and four inches in diameter, and consequently when you size up the comparatively small bucket you can estimate that it is ample.



Q. Will you state whether or not, from your examination, you discovered that the shaft of the drum was sprung at any place?

A. No, I didn't.

Q. Were you present during any time when the hoist was operated?

A. Yes, I have been up to the Interstate mine on different jobs and been inside.

Q. On this occasion did you have the hoist operated in your presence?

A. Oh, yes.

Q. Now what is the action of the clutch lever when it is pulled backward and forward?

MR. PLUMMER: If Your Honor please, I shall object to that. We tried to prove the same thing by our expert witness, who operated hoists of this character and hoists in general, and counsel objected, on the ground that it was calling for his conclusion.

THE COURT: Read the question, Mr. Reporter. (Question read.)

THE COURT: What do you mean by "What is the action"?

MR. WAYNE: Particularly—

THE COURT: What is its effect or function?

MR. WAYNE: Yes, particularly its effect on the clutch band.

THE COURT: Oh, he can answer that. That is a mere description of the mechanism.

A. The levers are so arranged and pivoted that a large motion of the lever on the part of the engineer gives a very small motion to the lever that actu-

ates this clutch band. The lever, when the engineer pulls it back there is a connecting rod that connects with the balance crank on the vertical shaft, and when they twist that number one crank it turns the shaft, which in turn moves number two crank, and the lateral motion of that number two crank pushes a shifting device, which slides along the shaft, and that moves a small toggle, which moves in a very small arc of a circle, and the actual motion of that last lever is a very small fraction of an inch, but sufficient to move another lever, which in turn tightens the friction band.

MR. PLUMMER: If Your Honor please, I don't think there is any issue in this case as to the general construction of this hoist.

MR. WAYNE: These are all preliminary matters.

THE COURT: No. Let us get along with this rapidly. This is merely preliminary, as I understood.

MR. WAYNE: Q. Mr. Kaar, what is the position of these clutch bands when the clutch is released or thrown out?

A. You mean with relation to the drum or the drum shaft?

Q. The shaft of the drum, yes.

A. It takes close watching with the eye to see very much motion in that friction band. The material isn't compressable at all, and when you tighten up on the clutch band it squeezes very tightly on the friction surface, and when it is let go the motion is

very small, but at the same time the intense pressure is not there that is there when a man has pulled the clutch lever and pulled it down. I don't suppose that the clutch band clears the clutch surface much more than probably a sixteenth or an eighth of an inch.

Q. From your examination of this hoist, and particularly of the clutch and the clutch band, will you state to the jury what was its condition?

A. The hoist was in good condition Sunday morning when I examined it, and I had the hoist man run it up and down the shaft a number of times, and hoist a loaded bucket, both for the sake of watching the operation of the hoist and to get an estimate of the horse power which it was developing. I not only took the speed of hoisting from the bottom of the shaft, but the general condition of the hoist.

Q. Do you mean to include in your answer the condition of the clutch and the clutch band?

A. That would necessarily follow, yes, sir.

MR. WAYNE: Take the witness.

CROSS EXAMINATION by

MR. PLUMMER:

Q. You are employed by whom?

A. The Coeur d'Alene Hardware & Plumbing Company of Wallace.

Q. Do they handle this make of hoist?

A. No.

Q. Did you ever run this kind of a hoist?

A. No, sir.

Q. When was it you made the examination you speak of?

A. Last Sunday morning.

Q. This last Sunday morning?

A. Yes

Q. How many hoists of this same make, do you know, have they in the mine?

A. I don't know of any other.

Q. Do you know whether or not this is the same hoist that this accident occurred in, except from hearsay?

A. I do not.

Q. And you don't know how many they may have of this same make in this same mine, do you?

A. No, sir.

MR. PLUMMER: That is all.

RE-DIRECT EXAMINATION by

MR. WAYNE:

Q. Did you notice from the name plate on this hoist the year it was put out?

A. Yes. It was made in 1914.

MR. WAYNE: That is all.

RE-CROSS EXAMINATION by

MR. PLUMMER:

Q. How do you know?

A. It is on the name plate. Each maker puts his name plate on there, and puts the date and the number of the machine on it.

Q. You don't know how much it has been used since that time?

A. I do not.

MR. PLUMMER: That is all.

MR. WAYNE: That is all. If Your Honor

please, that includes the witnesses I was trying to let go.

THE COURT: Well, you may put on one more witness.

RAY DELINE, produced as a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. WAYNE:

Q. You may state your name?

A. Ray Deline.

Q. Where do you reside?

A. Interstate-Callahan.

Q. Are you working there at the present time?

A. Yes, sir.

Q. How long have you worked there?

A. Well, this last time since May 20, 1915.

Q. Were you working there in the month of May of this year?

A. Yes, sir.

Q. Whereabouts in the mine were you working?

A. At the old shaft.

Q. At the old shaft?

A. Yes.

Q. Under whom did you work?

A. Why, foreman McDonald, I guess

Q. Were you working in the month of May down at the new shaft?

A. No, sir.

Q. What was your particular job?

A. Running hoist.

Q. What hoist did you use at the old shaft?

A. At what time?

Q. When you were running the hoist, prior to March of this year.

A. The hoist they have got over at the new shaft at present.

Q. Do you know whether or not that is the same hoist that was in use at the time Witkouski met his accident?

A. Yes, sir.

Q. Is it the same hoist?

A. Yes, sir.

Q. How long had you run that hoist at the old shaft?

A. From July 7, 1915, to March 7, 1916.

Q. And then it was taken down to the new shaft, was it not?

A. Yes, or just a few days after that.

Q. How much of a load was that hoist pulling at the old shaft?

A. Well, before they took it away—

MR. PLUMMER: There is no issue, if Your Honor please, on the capacity of this hoist. I think that question is immaterial. We admit that if it was in a reasonably good condition of repair it would raise a reasonable load, including the load it was lowering down at the time this accident occurred, with safety.

MR. WAYNE: Take the witness then, with that admission.



CROSS EXAMINATION by

MR. PLUMMER:

Q. Were you on one of the shifts at the old shaft?

A. Yes, sir.

Q. How many shifts were there there at the time you worked there?

A. Part of the time three and part of the time two.

Q. Part of the time three and part of the time two, you say?

A. Yes, sir.

Q. And the hoist was run then continuously in hoisting operations that you know of, at the old shaft, from July, 1915, to March, 1916?

A. Yes, sir.

MR. PLUMMER: That is all.

RE-DIRECT EXAMINATION by

MR. WAYNE:

Q. How long is one of those hoists supposed to run, if you know?

MR. PLUMMER: Just a moment. He isn't qualified as an expert, as to the life of a hoist.

THE COURT: Sustained.

MR. WAYNE: Q. How long have you been a hoist man?

A. Well, if it is all put together, about two years and a half.

Q. Do you know what is the average life of one of these hoists?

MR. PLUMMER: If Your Honor please, I don't think the witness would be qualified to answer that

question, because the life of it would depend on how it is operated and used, and so many different things, that there is no standard, I think.

THE COURT: Why is it material anyway, with the admission that counsel has made that if this had been in proper repair it was sufficient at the time.

MR. PLUMMER: I meant in proper repair and condition.

THE COURT: You don't contend that it was out of condition in any other respect except the—

MR. PLUMMER: That is all, but I didn't want to use the word repair as distinguished from condition.

THE COURT: But you refer to the same thing.

MR. PLUMMER: Yes, the same thing. Outside of that, the capacity was ample, and these men could have been lowered with safety. That is all.

MR. WAYNE: That is all.

THE COURT: You may call one more witness.

EDWARD E. HUGHES, produced as a witness on behalf of defendant, being duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. WAYNE:

Q. State your name?

A. Edward E. Hughes.

Q. Where do you live?

A. At the Interstate-Callahan mine.

Q. Are you employed there?

A. I am.

Q. How long have you been employed?

A. Three years and a half.

Q. What is your official position?

A. Master mechanic.

Q. Have you any assistants?

A. I have.

Q. How many assistants?

A. Well, that depends; it depends on how much work we have. I have from two to four, outside of the compressor men, outside of the operators.

Q. What was your position there in the month of May of this year?

A. I was master mechanic.

Q. How often did you, as master mechanic, inspect the machinery in the mine?

A. The machinery in the mine was inspected daily.

Q. And who was inspecting it immediately prior to the 18th of May?

A. I was myself.

Q. Do you remember when Mr. Witkouski met with his accident?

A. I do.

Q. When was the last time prior to his accident that you had inspected this hoist?

A. It was the previous night or evening, I should judge between seven-thirty and nine o'clock in the evening.

Q. What inspection of the hoist did you make at that time?

A. I looked at the cable, the clutch, the brake, and the bearings.

Q. What do you mean by the bearings?

A. You see the pinion shaft is supported by two bearings; it runs in two bearings, and also the drum shaft does, the thing that supports those.

Q. What was the condition of the hoist, and particularly of the clutch and the clutch band, at the time you made this last inspection?

A. It was all right.

Q. Will you state whether or not the shaft on the end of the drum was sprung?

A. It showed no bend at all or spring in it, absolutely none.

Q. Now when was the next time you inspected the hoist?

A. The next time was the following morning after this accident, about, I should judge, eight or eight-thirty o'clock in the morning.

Q. Who was present at that time?

A. Mr. McDonald, the foreman, and Charlie Mead, the hoist man.

Q. And what inspection did you make of the hoist at that time?

A. I examined the clutch, and that clutch bolt, and also the brake band, and all the mechanism that was connected from the lever clear to the brake band, to the final end itself.

Q. And what was the condition of the hoist at that time?

A. You mean the operating condition?

Q. Yes.

A. It was all right.

Q. And what was the condition of it after the

accident, as compared with what it had been at the time of your last inspection?

A. I could see no difference.

Q. And will you state now whether, after you looked this hoist over and inspected it, you made any further tests, or if any further tests were made in your presence?

A. The machines were not in the bucket when I got in. Well, there was nothing in the bucket when I got in. We ran the bucket up and down light, and then to satisfy myself further I held on to the brake while Mead opened the throttle, when we had the bucket pretty well down the shaft; and we couldn't slip the clutch, and I couldn't hold the brake tight enough so that the clutch would slip. I couldn't hold on to the brake tight enough so that the engine would slip the clutch. It was tight.

Q. How is that clutch loosened?

A. That clutch is loosened by loosening— You mean the clutch loosened in operation?

Q. No. The clutch band.

THE COURT: Well, in operation, you mean?

MR. WAYNE: No. At other times.

A. The clutch band on one end of it has a Tee bolt. It is nothing more than a bolt or an arrangement just like the letter T. Down here there is a thread, and there is a nut on that thread, and in order to loosen that you have got to unscrew this nut.

Q. And how large a nut is that?

A. That is an inch and a quarter nut.

Q. How large a bolt?



A. Inch and a quarter bolt.

Q. Now when you loosen that bolt it releases the clutch, does it not?

A. Yes, sir.

Q. How, in operation, do you release or apply the clutch?

A. The clutch is operated entirely by the clutch lever.

Q. When the clutch is thrown out, will you state to the jury whether or not there is any friction on the shaft of the drum?

A. When the clutch is thrown out there is friction, and that is due to this: The lining that we have on that clutch band is Johns-Manville Brake Lining, and it is the same thing as is used on the service brake on an automobile, and that offers a great frictional resistance, and the weight of that band alone just dragging on the clutch surface will tend to retard it enough so that it makes it hard to rotate, even though it is slight, that is, by hand.

Q. Mr. Hughes, about what is, if you can tell the jury, the play in the clutch bands?

A. I don't believe the movement is— it is under a quarter of an inch.

Q. Under a quarter of an inch?

A. That is, it corresponds to making it a quarter of an inch shorter, in case of releasing it.

THE COURT: I don't believe the jury will understand that. Can't you explain it a little more fully?

A. The clutch lever has two notches in it, a notch that is clear ahead, then it is loose, it is free, and



when it is back, it is tight, and that movement of the lever, the lever is about four feet, about four feet long, and you move the handle of that lever a distance of about eighteen inches, and that produces a corresponding movement to this clutch mechanism on the clutch band. On that friction band there is something less than a quarter of an inch, so you get an enormous pull.

Q. What you mean, Mr. Hughes, is that when you tighten the clutch with the lever it moves the band, the clutch band, only about a quarter of an inch?

A. Just about.

THE COURT: That is, it contracts it, you mean?

A. Yes, sir.

MR. WAYNE: Q. It contracts it?

A. Yes, sir.

Q. What is the condition of the hoist now as compared with what it was this morning after the accident?

A. You mean at the present time?

Q. Yes.

A. Why, everything is the same, with the exception that we have re-lined the wooden blocks on the brake, and we have put in a key in this drum shaft that Mr. Mead mentioned.

Q. Otherwise it is the same?

A. And of course, you know, there may— some hoist man may have tightened up some little nut or something that I don't know about, but to my knowledge everything else is the same. And of course

we replaced a rod that was wearing, that belongs to this clutch mechanism, and all that change—none of that was done—it was after the fourth of July—it was in the middle of July.

Q. Of this year?

A. Of this year.

Q. What is the custom, when cable is to be re-wound upon the spool or drum, as to releasing the clutch?

A. Well, it would be very difficult for—

MR. PLUMMER: Just a moment. I don't think that answer is responsive. He asked what the custom was.

MR. WAYNE: Well, he said it would be very difficult—

THE COURT: Get right at it. What is the custom?

A. Why release this clutch bolt and unwind the cable to the place where it is slack, and then re-wind it so that it is even.

Q. And then after it is re-wound the nut is tightened again?

A. The nut is tightened before you start to re-wind.

Q. Do you know whose duty it was to loosen and tighten that nut when the cable was being rewound?

A. It was the hoist man's duty.

Q. State whether or not there was any difficulty in either loosening or tightening that screw or nut?

A. No, there was not.

Q. Now, Mr. Hughes, will you state to the jury

whether or not anyone ever complained to you of the condition of that hoist or the clutch or any part of the hoist?

A. Well, the only complaint—well, it wasn't a complaint. The only thing was from time to time there would be some little thing that needed attention, and whatever little thing needed attention was attended to. I can't recall any particular complaint, of anybody saying the thing wasn't right, or anything like that, but maybe one man would say, "Did you notice that," and if there was anything like that we would work right at it.

Q. If there were any repairs to be made you made them?

A. Yes, sir.

Q. Did they ever notify you of any repairs which were needed which were not made?

A. They have not.

MR. WAYNE: You may take the witness.

CROSS EXAMINATION by

MR. PLUMMER:

Q. You was at the head of that department, I assume?

A. I was.

Q. And any repairs that was reported to you or that you knew of you would see that they were made?

A. I did.

Q. When did you ascertain, if at all, how this accident happened, Mr. Hughes?

A. The following morning when I came to work, about seven o'clock.

Q. You ascertained, didn't you, at that time that it was the dropping of the bucket or the going down of the bucket—

A. I didn't know.

Q. Wait a moment. I hadn't finished my question. Did you ascertain at all before you made these trial trips just what had caused the fall or the dropping of the bucket?

A. I didn't know a thing about it until in the morning and I was getting ready to go in, and missed the tram.

Q. I don't care anything about your missing the tram. I just want to know the time when you found it out.

A. I found it out when I got in the mine. Mr. McDonald told me.

Q. When was that that you found it out, when was the time you found it out, with reference to the time you made those test runs you speak of?

A. You understand I found out there was an accident that morning when I came to work. I was outside the tunnel. I wasn't in the tunnel. I didn't know anything about how it occurred or anything that had been said about it, or anything at all, until I went in, and that is when Mr. McDonald told you that he sent for me.

Q. That is the first then that you knew how the accident had occurred, was when you went in there?

A. Well, I didn't know—I don't know how it occurred. I mean that it the first that I suspected anything there, yes.

Q. When you found out how it occurred, did you ascertain at that time?

A. I don't know what you would—

Q. Wait a moment. Maybe I don't understand you or else you don't understand me. I understood you to say you found out there had been an accident, before you went in, is that it?

A. Yes.

Q. And after you went inside, where the hoist was, or in that vicinity, you found out then how it had occurred, did you?

A. No, I didn't.

Q. When did you first find out how it had occurred?

A. I don't know. I can't say. I wasn't there.

Q. Why, then, did you make these tests of the hoist?

A. Well, if something,—if a man got killed in a shaft, and they said the bucket got away, there must be some reason. I couldn't even tell you exactly who told me when I got in there that the bucket got to going too fast and Mr. Witkouski tried to jump off; but I naturally would go and look to see what would let it go too fast.

Q. You had ascertained then before you made these tests that the accident had occurred in some way by reason of the bucket going too fast?

A. I had heard that said. I didn't know that.

Q. That is what I mean. I don't mean that you saw it.

A. Well, I don't know even that. I couldn't even



say that I heard that it went too fast. I heard that Witkouski jumped off the bucket.

Q. Was that why you made a test of the hoist? Is that the reason you made a test of the hoist, to see how it run, because you heard he had jumped off?

A. Well, in the first place, the hoist was idle, and when anything happens it is customary to go and look over everything and see what is the matter before anything is done, because if it is wrong somebody else might go and do the same thing, and maybe they would get caught.

Q. But if you had heard that he had jumped off the bucket what would that have had to do with the operation of the hoist, in your estimation?

A. Nothing at all.

Q. As a matter of fact you found out, Mr. Hughes, didn't you, before you made these tests you speak of, of the hoist, you found out that the bucket had got away—

A. I did not.

Q. That the engineer had in some manner lost control of the bucket, at least for a certain period?

MR. WAYNE: If Your Honor please, I object.

THE COURT: All that counsel means, Mr. Wayne,—Your question is rather unfortunately worded. Of course this witness wasn't there.

MR. PLUMMER: No, I know.

THE COURT: He evidently thinks you are trying to get him to say that he knew or ascertained, as you put it, when of course he couldn't ascertain except what he heard. All that counsel means, as I



understand it, is, what did you hear about it that put you on your inquiry, if anything. Did somebody tell you something about it, and, if so, what?

A. When I got in there I couldn't even tell you who, or anything about that,—when I got in there I understood, or somebody must have said something,—I couldn't even tell you who said that the clutch slipped.

MR. PLUMMER: Q. That is why you made these tests?

A. No. I went in there anyway to see what was the matter.

Q. But I say, after that was told you, you made that test?

A. I was trying it then; I was looking at the hoist.

Q. Didn't you know that the reason the clutch slipped was on account of this screw being loosened?

A. I did not.

Q. If you had known that, of course the test you made wouldn't have been necessary at all, would it, because it was tightened up at that time?

A. The test I made showed that it was all right.

Q. This screw or bolt you speak of was tightened up at that time so that it worked all right?

A. It was all right, yes; the hoist was all right.

Q. That screw, I say, was tightened up at that time?

A. Yes, it was tight, or it couldn't have operated like it did.

MR. PLUMMER: That is all.

MR. WAYNE: That is all.

THE COURT: I desire to ask a few questions.

Q. Did I understand you correctly in saying that you had tightened up this screw before you re-wound the cable, after taking it off?

A. Yes.

Q. You would loosen the screw to unwind the cable?

A. Yes, sir.

Q. And then you would tighten it and then re-wind the cable?

A. Tighten up the screw and pull up the clutch lever, you see; you see there is a lever that operates that clutch, and in order to change that cable you simply release that lever, undo the screw—

Q. I had another impression from some of the other testimony as to what was done in this case. I understood some of the witnesses to say that the preceding shift had pretty nearly finished re-winding.

A. Yes, that is the way I understand it, I mean from what I have heard.

Q. How could they do that and leave this screw loose, if it was loose at the time the next shift went on duty, that is, Mr. Witkouski's shift?

A. The only thing that could have been was this: They pulled the lever up and didn't tighten the screw, I should imagine; I don't know.

Q. If it had been handled properly, you mean, by the preceding shift, that unwound the cable, they would have tightened the screw after they finished

unwinding and before they began to re-wind it? In other words, the shift before Mr. Witkouski's shift unwound or started to reverse this cable?

A. Yes, sir.

Q. I understood the witness to say,—I am not sure whether I am right about it,—that they had fully unwound the cable, and had pretty nearly finished re-winding, before Mr. Witkouski's shift came on duty. And yet one of the witnesses stated that after the accident, that is, the hoist, man, found this screw still loose.

A. Well, if it was still loose, they hadn't tightened it, that is all.

Q. Yes, but it was possible to tighten it before they began to re-wind it?

A. Yes, sir.

Q. And that, you say, would have been the proper way to do it?

A. The exertion the men put in there to re-wind that wouldn't be one per cent harder.

Q. That wouldn't be a proper way to do it?

A. It could be done either way. He could just pull back his lever, you see.

Q. But there was no reason for leaving the screw loose after they got it unwound?

A. No.

Q. I mean there was no mechanical reason?

A. No, sir, none whatever.

Q. It might just as well have been tightened at that time?

A. Might just as well have been tightened at that time.

THE COURT: I am not sure whether I understood the witnesses correctly on that. Didn't the witnesses say they had pretty nearly finished re-winding the cable?

MR. WAYNE: Yes, sir, all but about seventy feet.

THE COURT: Yes, that is what I thought. I don't want to mislead the jury, if my recollection isn't correct.

RE-DIRECT EXAMINATION by

MR. WAYNE:

Q. Just to make this perfectly clear, Mr. Hughes. After the nut was loosened on the clutch bolt, it was possible, was it not, by throwing in the clutch lever to re-wind the cable, without tightening this screw or nut?

A. Yes, within all reason it was. Of course a man could take that nut clear off, and then the clutch lever wouldn't operate at all, but it happened to be so that that nut, you couldn't screw it that far off because of the angle it took with respect to the internal circumference of the brake, so you couldn't have got it clear off.

Q. You get no friction on the clutch band?

A. That depends on how far it was screwed out.

Q. But on the other hand there was no reason why it should not be tightened before the work of re-winding the cable began?

A. There is no reason in the world why it shouldn't.

MR. WAYNE: That is all.

RE-CROSS EXAMINATION by

MR. PLUMMER:

Q. That tightening or loosening, though, is done by the hoist man?

A. It is done by the hoist man.

MR. PLUMMER: That is all.

RE-DIRECT EXAMINATION by

MR. WAYNE:

Q. Were you ever called in to tighten up the nuts and bolts?

A. Well, not a little, trifling thing like that. The hoist man is supposed to be able, and is able, to take care of those things, and if he wasn't able to do those things he couldn't hold his job there as hoist man, because that is part of his duties.

MR. WAYNE: That is all.

MR. PLUMMER: That is all.

THE COURT: Do you have other witnesses?

MR. WAYNE: Yes, I have.

THE COURT: Gentlemen, we will take a recess until tomorrow morning at nine-thirty. Remember the hour.

Accordingly an adjournment was taken until 9:30 a.m., Saturday, Nov. 25, 1916.

*9:30 A.M., Saturday, Nov. 25, 1916.*

MR. WAYNE: We offer in evidence Defendant's Exhibit No. 8, if Your Honor please.

MR. PLUMMER: No objection.

MR. WAYNE: And, except for the suggestion that Your Honor gave, that one of the jurors wanted to inquire of one of the witnesses, we rest.

THE COURT: You asked me last evening, Mr. Hurm, whether you could ask a question of one of the witnesses. If the witness is here, I will recall him now.

JUROR HURM: I don't think he is here—the foreman of the mine, Mr. McDonald.

THE COURT: Mr. McDonald, will you come forward?

NORMAN McDONALD, a witness heretofore duly sworn on behalf of defendant, upon being recalled, testified as follows:

EXAMINATION by

JUROR HURM:

Q. Mr. McDonald, I don't know whether I understood you rightly. Didn't you state in your last evening's testimony that shortly after the accident you went and inspected this hoist?

A. Yes, sir.

Q. And made trials of it?

A. Yes.

Q. And its workings?

A. Yes, sir.

Q. Are you a machinist?

A. No.

Q. Have you ever been running those hoists?

A. A little bit, not much.

Q. Then you don't really know anything about the construction or the mechanism of the machine?

A. No, not as a mechanic.

JUROR HURM: That is all.



DIRECT EXAMINATION by

MR. WAYNE:

Q. You know in what manner the hoist runs, do you not, Mr. McDonald?

A. Yes, sir.

Q. And you can tell whether or not the clutch is holding, can you not?

A. Yes, sir.

MR. WAYNE: That is all.

CROSS EXAMINATION by

MR. PLUMMER:

Q. I suppose, Mr. McDonald, that you have the same general knowledge of how to use the hoist, to raise up a bucket or let a bucket down, that an ordinary man would have that has a general knowledge of mining machinery, just in a general way?

A. Yes, sir.

Q. You are not, of course, an expert of the character that you believe would be competent to make inspections of machinery and report on the different things that are necessary, or anything of that kind?

A. No, sir.

MR. PLUMMER: That is all.

MR. WAYNE: That is all. We rest, Your Honor.

MR. PLUMMER: We will call Mr. Moran.

EDWARD P. MORAN, a witness heretofore duly sworn on behalf of plaintiffs, upon being recalled in rebuttal, testified as follows:

DIRECT EXAMINATION by

MR. PLUMMER:

Q. The day this accident happened, or any other

day, did you know anything about this bolt having been loosened?

A. No.

MR. WAYNE: I object to that, if Your Honor please, as immaterial, and also as not proper rebuttal.

MR. PLUMMER: Well, I don't know myself that it is necessary, if Your Honor please, but just in the exercise of an abundance of precaution I am offering it. There was some suggestion by some witness that he understood that it was the general understanding of the people in the mine that that thing was loosened from time to time. If counsel object on the ground that it isn't rebuttal he can't complain that we didn't offer it. So with that understanding I will withdraw the witness.

THE COURT: You may stand aside.

MR. PLUMMER: We rest.

MR. WAYNE: If Your Honor please, I desire to make a motion, or, rather, extend the motion I have already made.

THE COURT: It isn't necessary for the jury to retire for that purpose, is it? You mean you simply wish to re-present the motion at the present time, or to enlarge it, or what?

MR. WAYNE: To enlarge it, yes, somewhat.

THE COURT: I think you may go ahead.

MR. WAYNE: At this time, at the close of all the evidence, and when both plaintiff and defendant have rested, the defendant moves for a directed verdict in its favor, upon each of the grounds and for each of the reasons mentioned in the motion for a non-

suit, and particularly, but without waiving any of those grounds, for the following reasons:

1. That the evidence shows that the deceased assumed every risk and the risk of every defect mentioned in the complaint and mentioned in the evidence as grounds of negligence against the defendant.

2. That the deceased met with his accident solely and entirely by reason of his own negligence or contributory negligence.

3. That if the accident was not due to the negligence of the deceased himself, it was due to the negligence of a fellow servant or fellow servants, whose negligence was one of the assumed risks of the deceased, and for which negligence the defendant would not be liable.

4. That there is no actionable negligence proven in this case as the proximate cause of the accident to the deceased, and which is mentioned or described in the complaint. If Your Honor has the complaint there, I will direct your attention to paragraph B of Paragraph 12, Section B of Paragraph 12, which is the only charge of negligence now left in the case, and the negligence here sought to be proven is not the act or omission charged in the complaint. Furthermore, assuming everything in favor of the evidence for the plaintiff, and assuming even that there was this sprung shaft, still that was not the proximate cause of the injury, but the proximate cause of the injury was the loosening of that bolt.

THE COURT: The motion will be denied.

MR. WAYNE: We will save an exception.

THE COURT: Yes. I may say to you, Gentlemen of the Jury, that the denial of this motion is of no interest to you. It will still be for you to pass upon the questions of fact, under the instructions that I shall ultimately give to you. If there is any evidence at all to support a certain proposition, it is the duty of the court to submit the question to the jury. It is only where the evidence is insufficient as a matter of law, taking the most favorable view that can possibly be taken of it to the plaintiff, that I can take the case from the jury, and here in my view there are some disputed questions of fact that must be submitted to you. In denying this motion you are not to infer that I have any opinion one way or the other as to the preponderance or weight of the evidence, or as to whether you should find for the plaintiff or for the defendant.

(Counsel upon both sides thereupon made their arguments to the jury.)

THE COURT: Gentlemen of the Jury, the pleadings and also the evidence in this case have taken rather a wide range, but, as not infrequently happens in the trial of a law suit, when all has been said that can be said, the real issues become rather narrow, and, as I shall explain to you in the course of my instructions, you will find that there are comparatively few issues of fact for you to pass upon in this case, and that those issues are controlling of the rights of the plaintiffs and the defendant. The plaintiffs rely upon a statute of the state by which

it is provided that where one is employed by another, and he meets his death as a result of the negligence of his employer, the failure of his employer to perform some duty to him, as a consequence of which he meets his death, the heirs of such deceased person may recover damages for such negligence from the employer. Acting under that statute, the plaintiffs here, Mrs. Witkouski and the two children represented by her as their guardian, have come into court claiming that they are the only heirs of the deceased, Charles Witkouski, and further claiming, as you have heard, that he met his death through the negligence of the defendant company. It is conceded that Mrs. Witkouski and the two children are the only heirs, and that if anybody is entitled to recover on account of the death, they are entitled to such recovery. So that there is no issue upon that question.

Now, as already suggested, it is a prime consideration whether or not the death was the result of a failure on the part of the defendant company to discharge some obligation which it owed to the deceased at the time of his death, that is, was it negligent, and did such negligence, if any there was, contribute to his death.

Generally speaking, negligence may be defined as the performance of some act, the doing of some thing, which, under the circumstances, a reasonably prudent and careful person would not do. You will see that the standard is not an absolute or arbitrary one, but it is a question of what ordinarily reasonable, careful persons, properly regardful for the rights



of others, would do under the particular circumstances, or, the converse, it is the leaving undone of some thing, some act, which such prudent and reasonably careful persons would have done under the circumstances. It may be negligence of commission or negligence of omission.

Now, I am also going to refer to what in law is known as contributory negligence, that is, the negligence of the person injured, in this case Mr. Witkouski, who lost his life. Contributory negligence is defined in the same way, that is, it is the doing of some thing which a reasonably careful person would not do, or the leaving undone of some thing which a reasonably careful person would do, under the circumstances. It is called contributory negligence because it is charged to be the negligence of the person who is making the claim or upon whose behalf the claim is being made. The same definition, however, applies to negligence, whether it be primary or contributory.

There are in the complaint a number of charges, or, rather, charges of a number of particulars in which the defendant failed to perform its obligation to the deceased or to do its duty. Most of those have been eliminated, that is, the plaintiffs have abandoned all of the charges of violation of certain statutes of the state relating to the operation of mining properties in the state, and they are therefore withdrawn from your consideration. Generally speaking, the ground upon which the plaintiff finally relies is that the defendant company failed to discharge a duty



which the general law imposes upon all employers of others. That may be defined in this way: One who employs another must use reasonable care to see that the place where the servant or employe is asked to work is reasonably safe for the performance of the servant's duties, and by reasonable inspection at reasonable intervals to see that it is kept reasonably safe. That duty applies not only to the place where the employe works, but to the instrumentalities or tools with which he is asked to discharge his duties. I say that it is a duty applicable to all employers of labor, it makes no difference in what line of activity or employment. It is applicable to the mine owner, it is applicable to the owners of railways or boats or of lumbering plants, or of farms. It is always the duty of the employer to use reasonable care to see that his employe has tools or instrumentalities which are reasonably safe, and also that the place in which he works is reasonably free from danger. Now that is the general duty which the plaintiffs contend the defendant violated, and that, by reason of its failure to discharge that duty, the accident occurred; and it will be for you to say whether, under all the circumstances of the case as you believe them to be from the evidence and the instructions which I give you, the charge is sustained in this respect.

The defendant, upon the other hand, contends that even though it may appear that the instrumentality to which the accident was due was out of order or in a defective condition at the time of the accident, it

is not responsible, under another principle of law which is equally well recognized, and which is equally binding upon you, and by which you are controlled to the same extent, and that is, that the deceased himself was guilty of contributory negligence, in that, having knowledge of the defective condition, or, rather, having charge of the instrumentality, the hoist, and further being charged with the duty of seeing that it was kept in a safe condition, he failed to discharge that duty, and that as a consequence of his contributory negligence in failing to inspect and keep the hoist in proper condition, he met his death. I have to say to you that it is a general principle of law, binding upon the courts and upon the jury, that if a master is guilty of negligence, and the employe, the person who is injured, is also guilty of negligence, and if such negligence contributes to the accident complained of, or the injury for which a recovery is sought, a recovery cannot be had. In other words, if one is negligent himself, and his own negligence contributes to his injury, he cannot recover if he is injured, nor can his heirs recover if he loses his life.

There is still the further principle of law, which is equally binding upon all of us, and that is, that where one enters upon work for another, or, in this case, to be specific, where Mr. Witkouski entered into the employment of this defendant company, he impliedly agreed that he would take the chances, he would assume the peril, or, as it has been frequently put during the course of the trial, he would assume

whatever risk there was incident to the possible negligence of his co-employees, his fellow servants. That is to say, he would relieve the defendant company from any liability or responsibility for any damage or injury which he might suffer as a consequence of the negligence of some other employe engaged in the same line of service with him. To give you an illustration about which there could not be any doubt, if this accident had occurred as a result of the negligence, for instance, of one of the other two men who were engaged with him in sinking this shaft, he could not recover, however gross that negligence might be, because when he entered the employ of the company and undertook work with these other two men in the same department, he impliedly, under the law, said to the defendant company: "If one of these men is negligent and I am injured as a consequence, I will not hold you responsible. I recognize the fact that one of them may be negligent, and that I may be injured, but that is my look-out. I will take the chances." Now all of these three or four principles of law that I have explained to you are well settled, prevail in this jurisdiction and in this court, and they are all equally binding upon all of us, and we can't ignore one of them without violating our duty.

Now further in explanation and limitation of these principles, I refer again to the general duty of all employers to use reasonable care to provide a safe place and to provide safe instrumentalities for the employe. That duty is not delegable, as we put it. In other words, it is always the duty of the employer,

here the defendant company, to use reasonable care to see that its mine is reasonably safe, and that the instrumentalities with which the miners work are in a reasonably safe condition. Now if any one of its employes, even though he may be working in the same part of the mine as the person who is injured, if any one of its employes or agents fails to discharge its duty in that respect, that would be no defense to a claim brought by someone who is injured, provided that person himself is not responsible for the defective condition of the mine or instrumentality. In other words, one who is charged with the duty of performing what it is the master's duty to do, here the defendant company's duty to do, of keeping the mine in safe condition, or the instrumentalities in safe condition, cannot be a fellow servant or employe with another, so that in this case if you find that the accident was the result of the negligence of some one who was acting for or in the mechanical department, rather than the operating department, then that is a risk from another employe of the defendant company which the deceased did not assume. He assumed risks from the negligence of fellow employes only when those employes were in his department, the mining department, rather than the mechanical department.

Now let us endeavor to apply these principles. The defendant concedes that the accident in question, that is, the too rapid descent of the bucket, upon the night of the accident, was due to the fact that the clutch would not properly perform its function, for



the reason that some one had loosened a screw and thus released the clutch so far that by the use of the lever it would not engage closely with the drum or that part of the drum that it was intended to engage with, and therefore would not control its speed. And I have to say to you that the evidence very strongly tends to show that the condition of this screw or bolt or nut is the proximate cause of the injury, or the accident, rather, and is the only immediate cause of the accident. There is some evidence tending to show that the shaft of the drum was sprung. However, the plaintiffs do not allege, and, as I understand, do not claim now, that this sprung condition of the shaft, even if you credit that testimony, directly contributed to the accident. That was brought in only for the purpose of attempting to explain why it was necessary to loosen this screw or bolt or nut. The defendant contends that it was not sprung, and that that is not the reason for loosening the bolt or nut, and the plaintiff contends that it was. But it is not alleged, and it is not now claimed, that the condition of the shaft or the drum in any wise affected the operation of the hoist upon the evening in question at the time the accident occurred. In other words, the clutch would not have held any better had the shaft been in perfect condition. The fact, if it be a fact, that the shaft was sprung, did not in any wise affect the hoist man's control of the hoisting machinery at the time in question. There is some evidence also tending to show that certain keys were loose in and about the mechanism which con-

trolled the clutch or had to do with the operation of the drum, but I have to say to you that there is no substantial evidence tending to show that the condition of these keys in any wise affected the hoist man's control of the hoist at that time. Now I have said this to you in order that I may make clear the issue upon which you are to find, as I understand the evidence, at the same time explaining to you that you are not bound by any expressions as to the weight of the evidence or credibility of the witnesses or what the evidence shows, that I may make, unless the suggestions commend themselves to you as being the reason of the case and as being supported by the weight of the testimony. In other words, as I shall say to you finally, you are the sole judges of the weight of the evidence and the credibility of the witnesses, and you may disregard any comment that I may make upon the facts. I have referred to the issues of fact and to the evidence only for the purpose of making clear to you certain principles of law.

Now, assuming that you may find that, as is conceded by the defendant, the accident was due to the loosening of this screw, and the consequent inefficiency of the clutch, the question is, who is responsible in fact for that condition, and what bearing in law has such responsibility upon the claim which is here being asserted by the plaintiffs. The defendant contends that Mr. Witkouski, the deceased, was in charge of this crew, and that, being in charge of the crew or group of men, including the hoist man, it was his duty and the responsibility was upon him



to see that a proper inspection of the hoisting apparatus was made, and that it was in proper condition, and that if he failed to perform this duty, and, as a consequence, was injured, the injury must be deemed to be the result of his own failure to do his duty, and therefore, under the principle I have stated, of course, the plaintiffs here could not recover. Now it is in evidence that he was at the head of this crew, for certain purposes at least. It is conceded by the plaintiffs that he had charge of the crew in so far as the operation of sinking this shaft was concerned, but they contend that he did not have charge of the motor man, or hoist man, in so far as the operation and maintenance and repair of the hoist were concerned; that the only control he had over the hoist man was to give him the signals and tell him what to do in using the hoist, but that he had nothing to do with and was charged with no responsibility relative to keeping it in repair or seeing that it was in a safe condition. And right there arises the sharp issue, and, as I think, the controlling issue in the case. The defendant on the other hand contends that he had entire charge of the crew, including the functions of the hoist man in taking care of and seeing that the hoist was kept in repair. Now then, gentlemen, if from all of the evidence you find that Mr. Witkouski did not have control of the hoist, that he was not charged with the responsibility of keeping it in repair, if he did not have the direction of the hoist man as to what should be done from time to time in seeing that the hoist operated properly, but

that he could only direct him in so far as giving him the signals and telling him when the hoist should go up and go down, and how rapidly, and so forth, and further that the hoist man, in so far as the mechanical work of keeping this hoist in condition was concerned, was under the control and direction of the mechanical department, ultimately the master mechanic, then you could not find that the hoist man is a fellow servant with the deceased, and therefore the negligence of the hoist man in loosening this screw and leaving it loose, would not be a risk taken by the deceased, and if he was injured as a consequence of such negligence then the plaintiffs here could recover, provided,—and here is the limitation upon that,—provided Mr. Witkouski did not know or have reason to believe that the screw was loose at the time, and, further, was unable to appreciate the danger therefrom. Even if he was not to blame, and if no fellow servant of his was to blame, for leaving this screw loose, and yet he knew that it was loose, and, by reason of his experience or what he had been told, or by the use of his own common sense he was able to appreciate the danger, and still, knowing the facts, and appreciating the danger, he for any reason, owing to his desire to get on with the work, or through recklessness, or for any other reason, went ahead and entered the hoist that evening for the purpose of being carried down, and lost his life, he could not recover, because then he would have assumed that risk. Upon that hypothesis, he knew of the danger, and, knowing of it, he took the

chance. No man can, with an appreciation of a danger, go ahead and take the chance, and then recover from the person who is responsible for the peril.

I think I have already explained to you that even if, upon the other hand, you find that the accident was due to the fact that this screw had been loosened by Mr. Lytton, I think it is,—the former hoist man,—and had negligently been left loose by him, and that he had not informed the succeeding hoist man, or Mr. Witkowski, or the other members of the crew, of the fact, still if you further find that the hoist man, in the matter of keeping the hoist in condition, was acting under the direction and control of Mr. Witkowski, they would therefore be fellow servants, and neither Mr. Witkowski, nor his heirs, could recover for such negligence. You will see that the whole issue there is as to whether or not the hoist man was under the control of Witkowski so far as the mechanical work was concerned of keeping this hoist in condition, or whether he was under the control and direction of the mechanical department, and therefore was representing the master in the performance of this primary duty of keeping the appliances and instrumentalities in a proper condition of repair.

Now there is a further consideration, gentlemen. Some suggestion has been made, and perhaps the argument has been made,—I wasn't giving very particular attention to it at the time,—that the deceased cannot recover because he was guilty of contributory negligence in jumping from the hoist bucket at the

time he did, and thus losing his life. It appears that the other three men remained in the bucket or upon the bucket, and suffered no serious injury, but that Witkouski jumped, and thus lost his life. It doesn't necessarily follow that because he jumped and was injured, and the other three men who were with him remained on the bucket and suffered no injury, he was therefore guilty of a careless act which constitutes contributory negligence. It doesn't follow that because one who in the presence of danger, being under the necessity of choosing between two or more alternatives, chooses badly, he is guilty of contributory negligence. The general question which you should ask and answer as to this particular phase of the case is whether or not, in the light of all the circumstances, under all of the conditions, the deceased acted reasonably. Did he, in the presence of the danger, being suddenly confronted with an emergency, did he act in a reasonable way? It may have turned out not to be the best way, but that is not conclusive. Would a reasonable man have acted in the way he did? If so, and even if it be a mistake, he could not be charged with contributory negligence in that respect.

Perhaps, to sum up, and to state what I have already said to you in a somewhat different way, if you find from the evidence that the witness Lytton, who was the hoist man on the shift immediately preceding him, was under the direction and exclusive command and authority of the master mechanic or general foreman, or both, and that Witkouski had

no authority over or right to give orders to or direct said Lytton as to the matters and things incident to or pertaining to keeping said hoist in a reasonably safe condition of repair and efficiency, and the said Lytton, when he went off shift, left the same in an unsafe condition of repair and efficiency, without notifying the succeeding engineer, Egbert, of such condition, and that his failure to so notify said Egbert was the proximate cause, or contributed to the death of the deceased Witkouski, then you should find for the plaintiffs, unless you find that Witkouski was at the time informed or knew of the mechanical conditions existing in and about the hoist, and was able to appreciate the risk incident thereto, and still, notwithstanding such knowledge and appreciation, attempted to ride down upon the bucket as it was being lowered into the mine.

In passing upon these issues, gentlemen, I have to say to you that the burden is upon him who asserts the existence of a fact to establish it, and in a civil case of this character to establish it by a preponderance of the evidence. By a preponderance of the evidence is not necessarily meant a greater number of witnesses, but a greater weight of the evidence. That is what the word "preponderance" means,—evidence which convinces you that the truth lies upon this side or that. It is that which is more convincing, more persuasive. The burden therefore is upon the plaintiffs in the first place to show by a preponderance of the evidence that the defendant was guilty of negligence in the respect charged in the complaint,



and the respect to which I have called your attention, that is, in not keeping the place or the instrumentality with which the deceased was called upon to render his service, in a reasonably safe condition; as to that the burden is upon the plaintiffs. Upon the other hand, when a defendant comes in, relying upon the defense of contributory negligence, or assumption of risk, the burden is upon the defendant to establish by a like preponderance of the evidence the existence of the facts constituting such contributory negligence or assumed risk, unless such contributory negligence or assumed risk already appears from the plaintiff's testimony.

It is another rule of law that a person is presumed to have a due regard for his own safety, and that presumption goes to the extent of establishing a prima facie case in the absence of evidence to the contrary, that one who was injured did not himself negligently or willfully cause the injury. It is somewhat kindred to the rule I have already stated to you in regard to the burden of the proof. Of course, this presumption may be overcome by the facts and circumstances in the case, by the evidence, direct or indirect, by inferences which are properly drawn from the evidence, and while there is a presumption here, to which I have called your attention, that Mr. Witkouski did not wilfully or negligently do that as a result of which lost his life, that isn't conclusive. You may infer from all of the circumstances and all of the testimony, direct or indirect, that he was negligent. In that connection you may take into consid-



eration such motives or incentives as the deceased may have had, if any, for being careless or for taking chances, if the evidence discloses such motives. It was claimed by the defendant in the course of the argument that he was anxious to get ahead, that he was in a hurry, and was pushing the work, and that there was some bonus that the men were working for, and that therefore he was more ready to take a chance that he otherwise would be. You may consider the evidence in so far as it justifies such an inference or does not justify it. Consider all of the facts and circumstances, and say whether or not the defendant has overcome this presumption of due care.

As I have already explained to you, you are the sole judges of the weight and credibility of the testimony of the several witnesses, and in determining the credibility to be given to the testimony of any witness you have a right to take into consideration his interest, if any, in the result of the case, his feelings in the matter, his demeanor upon the witness stand, his candor or lack of candor, and all other facts and circumstances which would influence you out of court in determining whether or not a man has told the truth. Bring to bear your own common experience and common sense in weighing the testimony and in passing upon the credibility of the witnesses.

As I have already stated to you, you may disregard any views which I have expressed as to the weight of the evidence or of the facts. I have not intended to influence you, and do not wish to influence you in any way. I have referred to the facts and the issues

only that I might assist you in applying the principles of law, to make the statement of these principles concrete, rather than general. Upon the other hand, gentlemen, as I am leaving to you the responsibility of passing upon the facts, you should in good faith undertake to apply to the facts in the case the principles of law as I have stated them to you. A juror is neither a good juror nor a good citizen who is unwilling to do that. It is fundamental to our governmental system and our system of administering justice. It is not the right of any juror to go to the jury room and say that he isn't satisfied with the explanation of the law that the court has given, and decline to apply it or follow it. If you make a mistake as to the facts, that responsibility is upon you. If I make a mistake as to the law, the responsibility is on me, and there is a remedy; it may be corrected by presenting my action to a higher court. So that you should in good faith undertake to apply the instructions I have given to you, in their letter and spirit, so far as you are able to understand them.

Now if you should find for the plaintiffs upon these general issues, that is, that they are entitled to recover at all, it will be your duty to assess the amount of damages which you believe from all of the evidence they are entitled to. You have a right to take into consideration the earning power of the deceased at the time of his death, what pecuniary loss, if any, has been suffered and will in the future be suffered, if any, by the plaintiffs, by reason of his death. You cannot allow anything on account of sympathy mere-

ly. Those are distressing circumstances, but the law cannot compensate for those things. But you may take into consideration the loss, if any, which the minor children have suffered and will in the future, in all reasonable probability, suffer, up to the time of their arriving at the age of majority, that is, up to the time of twenty-one years. I doubt not that counsel's suggestion in his last argument, of going at this in a mathematical way, was an inadvertence, and not intentional, but of course you couldn't consider the relation of a father to these children for the balance of his life according to the expectancy, because the children would have no demand, or right to demand, anything from the father after they had reached the age of majority, the age of twenty-one years. You have a right to consider, as I was saying, the reasonable probability of what loss the children will have suffered up to the time they may reach their age of majority, by reason of the loss of fatherly advice which the deceased might have given them, his direction, his influence, the education which he might have been able and been willing to provide, as well as any pecuniary loss which they have suffered or the widow has suffered, and which in all reasonable probability they will suffer in the future, the children up to the time of their arriving at the age of their majority, and you may take into consideration the reasonable expectation in years that he, the deceased, in all reasonable probability, would have lived if he had not been killed by such accident, the reasonable expectation of his earning power, wheth-

er it would have been more or less than just at the present time, and such use of the same, in whole or in part, as you think he would have made thereof for the benefit of the children and of his widow. In making such estimate, gentlemen, you can not refer to any hard and fast rule or any specific standard. The law has not attempted to prescribe a measure or a standard, but has wisely left that to the good sense of twelve men, of the jury primarily, of the court, to determine, in the light of their experience, their knowledge of human life and human relations, to say in this case what the pecuniary loss to these two children and to this widow has been and will be by reason of the unfortunate death of Mr. Witkouski.

When you have agreed upon your verdict, if you do agree upon one, your foreman will sign it. In the one case the form of verdict merely provides a finding for the defendant. You have nothing to do but sign that one. And in the other case, should you find for the plaintiffs, you will use the form where a place is left for the insertion of the amount. After you have agreed upon the amount, if you do so agree, you will enter it in this place, and then your foreman will sign it. It is necessary that you all concur in finding a verdict. It is further necessary that you avoid a resort to chance or lot in determining the amount of the verdict, if you find in favor of the plaintiff.

Let the bailiff come forward and be sworn.

MR. WAYNE: If Your Honor please, after the

retirement of the jury shall I then take my exceptions to the instructions?

THE COURT: Yes.

(The bailiff was thereupon sworn.)

THE COURT: Gentlemen, you may retire temporarily. I may recall you after hearing the suggestions from both sides, and I may not. If I do not recall you, I will send in to your room by the bailiff the exhibits. You may retire.

(The jury thereupon retired from the court room.)

MR. WAYNE: If Your Honor please, I now desire to object and save exceptions to the following certain portions of the charge and instructions of the court to the jury:

1. To that portion of the charge wherein the court in substance and effect instructed the jury that if they believed that the duty being performed at this time in the way of tightening or loosening that nut was one which was performed by the hoist man as an employe of the mechanical, as distinguished from the operating, department, that then the hoist man would not be a fellow servant of Witkouski, the deceased, for the reason that it leaves out of consideration the question as to whether or not, by virtue of the entire crew being at that time engaged in the common employment of re-winding the cable, they had all become for that time fellow servants employed in the mechanical department.

2. We except to the requested instruction which Your Honor gave—I don't suppose you number them—that "If you find from the evidence



that the witness Lytton, who was the hoist man on the shift immediately preceding him, was under the direction and exclusive command and authority of the master mechanic or general foreman, or both, and that Witkouski had no authority over or right to give orders to or direct said Lytton as to the matters and things incident to or pertaining to keeping said hoist in a reasonably safe condition of repair and efficiency, and the said Lytton, when he went off shift, left the same in an unsafe condition of repair and efficiency, without notifying the succeeding engineer, Egbert, of such condition, and that his failure to so notify said Egbert was the proximate cause, or contributed to the death of the deceased Witkouski, then you should find for the plaintiffs," etc. It was not necessary, in order to make fellow servants of Witkouski and Lytton that Lytton, the hoist engineer on a different shift, should have been under the authority of Witkouski, and of course there is no claim that men on other shifts were under his supervision. Egbert was the hoist man on his crew, and Lytton was the hoist man on the other crew.

THE COURT: Right there, I don't believe I quite understand your position, Mr. Wayne. Wouldn't the instruction be, if anything, unduly favorable to you there? That is, if I understand your contention, it would be that Lytton would not under any circumstances be a fellow servant.

MR. WAYNE: I don't read it that way: "And that Witkouski had no authority over or right to give orders to or direct said Lytton as to the matters and



things incident to or pertaining to keeping said hoist in a reasonably safe condition of repair and efficiency."

THE COURT: As I understand, your position is, that whether Lytton was in the mechanical department or not, being on a preceding shift, he was not a fellow servant with Witkouski.

MR. WAYNE: He would be.

THE COURT: He would be, whether in the mechanical department or not?

MR. WAYNE: Yes.

THE COURT: In other wards, if he was acting for the mechanical department, but on another shift, he would be a fellow servant with Witkouski, even though Witkouski was not acting in the mechanical department?

MR. WAYNE: For the time being, they were all acting in the mechanical department. But the part I object to is the statement with regard to any authority Witkouski may have had over the engineer Lytton. There was no contention in the evidence that he did have any such authority, and it was not necessary, to make fellow servants of them, that he should have. He might have authority over Egbert, the engineer working under him on the same shift, but certainly not over an engineer or hoist man working on the other shift.

MR. PLUMMER: How can you complain then?

MR. WAYNE: I complain of it as being an erroneous construction as to the law.

THE COURT: I think I see your point.

MR. WAYNE: I have then one other exception.

THE COURT: Very well.

MR. WAYNE: The other objection and exception is to that portion of the charge which I think was given of the Court's own motion, which in substance and effect advised the jury that the burden was upon the defendant to show that the risk was an assumed risk, for the reason that the law, as we understand it to be, is that the action of negligence is based not on negligence in the abstract, but upon actionable negligence, and actionable negligence is such as negatives the idea that the risk through which the servant was injured was not one which he assumed.

THE COURT: In other words, the burden is upon the plaintiff of pleading and proving that he is free from assumed risk?

MR. WAYNE: Yes, proving actionable negligence, negligence of the master himself, and in such a particular as not to lay the servant open to the charge of having assumed the risk of that particular agency.

THE COURT: I doubt whether the jury was misled by this instruction, but upon its analysis, in the light of the suggestions of Mr. Wayne, I am inclined to think that perhaps it may be technically erroneous.

MR. PLUMMER: I would suggest that if there is any doubt about it you recall the jury and give them proper instructions.

THE COURT: Yes. I was just seeing about what I could —

MR. WAYNE: I should think about as good a way as any would be to cut out that part.

THE COURT: You may call in the jury, Mr. Bailiff.

(The jury was thereupon returned into court.)

THE COURT: Gentlemen, my attention has been directed to what I am inclined to think was an inaccuracy in a requested instruction which I gave to you. You will remember that after explaining to you somewhat at length what the issues are, and the general principles of law, and undertaking to apply them to the facts, I stated to you in substance that, to sum up, and perhaps to put the same principles in other words, I would give you another instruction, and thereupon I read from a paper which I held in my hand. I think the instruction which I read to you was somewhat inaccurate, and I have modified it so as to read thus, substantially:

If you find from the evidence that the witness Lytton, who was the hoist man upon the shift immediately preceding Egbert, and Egbert were under the direction and exclusive command and authority of the master mechanic or general foreman, or both, and that the deceased, and other pushers, as they are called, that is, occupying the same position that he did, with other shifts or crews, and you further find that Witkouski, the deceased, and other pushers, had no authority over or right to give orders to or direct said hoist men as to matters and things incident to or pertaining to keeping said hoist in a reasonably safe con-

dition of repair and efficiency, and that said Lytton, when he went off shift, left the same in an unsafe condition of repair and efficiency, without notifying the succeeding engineer, Egbert, of such condition, and that such conduct on his part was negligence contributing to or causing the injury, and his act in so leaving the screw and failing to notify Egbert constituted the proximate cause or contributed to the death of the deceased, then you should find for the plaintiffs, unless you further find that Witkouski knew or had reason to believe in the existence of the mechanical conditions which did exist, and which consiituted the defective conditions of the hoist, and was further able to appreciate the risk incident to such condition, and notwithstanding such knowledge or information, and such ability to appreciate the risk, attempted to ride down upon the bucket, when the hoist was in such defective condition.

Gentlemen, I have cut out from the general rules such rules as were offered in evidence. They are upon this little slip here. That was by agreement of counsel, that it should be eliminated from the rules which were not introduced. The photographs and also this map are here. I think these were the only exhibits. You may take them with you. You may now retire with the bailiff.

(The jury thereupon retired from the court room with the bailiff.)

*In the District Court of the United States for the  
District of Idaho, Northern Division.*

Bertha D. Witkouski, in her own behalf, and as  
Guardian ad Litem of the persons and inter-  
ests of Charles Witkouski and Eugene Wit-  
kouski, minors,

*Plaintiffs,*

vs.

Consolidated Interstate-Callahan Mining Com-  
pany, a corporation,

*Defendant.*

No. 657.

VERDICT.

We, the jury in the above entitled cause, find for  
the plaintiffs and assess their damages against the  
defendant in the sum of \$15,000 Fifteen Thousand.

ARCHIE A. GALLEN,

Foreman.

Filed Nov. 25, 1916.

W. D. McReynolds, Clerk.

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And comes now the defendant, Consolidated Inter-  
state-Callahan Mining Company and serves, pre-  
sents and files the foregoing as and for a full, true  
and correct Bill of Exceptions of all rulings made at  
and during the course of the trial of the above enti-  
tled action in the above entitled Court, which said  
rulings were duly objected and excepted to by the  
defendant upon the grounds mentioned therein, said  
exceptions being accompanied with the whole evi-  
dence in said case, the same being necessary to ex-



plain the said exception, and each and every one of them, and their, and each and every of their, relation to the case and to show that the said rulings, and each and every of them, tended to prejudice the rights of the said defendant.

Dated at Wallace, Idaho, this 6th day of January, A. D. 1917.

JAMES A. WAYNE,  
*Attorney for Defendant.*

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*In the District Court of the United States for the  
District of Idaho, Northern Division.*

Bertha D. Witkouski; and Charles F. Witkouski  
and Eugene D. Witkouski, minors by Bertha  
D. Witkouski, their guardian ad litem,  
*Plaintiffs,*

vs.

Consolidated Interstate-Callahan Mining Com-  
pany, a corporation,

*Defendant.*

I, Frank S. Dietrich, Judge of the District Court of the United States for the District of Idaho, Northern Division, as the Judge who presided in said Court at the trial of the case of Bertha D. Witkouski; and Charles F. Witkouski and Eugene D. Witkouski, minors, by Bertha D. Witkouski, their guardian ad litem vs. Consolidated Interstate-Callahan Mining Company, a corporation, tried in said Court on the 24th day of November, A. D. 1916, and ending on the 25th day of November, A. D. 1916, do hereby certify that the foregoing Bill of Exceptions was handed



me by the Clerk of the Court on the . . . day of January, A. D. 1917, for settlement and it appearing to me that the same has been within the time allowed by law, and within the time allowed by an order of this Court extending such time, served upon the attorneys for the plaintiff, together with notice that the same would be presented for settlement, and the attorneys for the plaintiff having made no objection to the settlement, and having offered no amendments thereto, and it appearing to me that the said Bill of Exceptions is correct and contains in substance all of the evidence offered at the trial of said cause, excluding exhibits which are separately certified and the instructions given by the Court herewith and all the exceptions taken by the defendant to the admission of testimony and to the giving and refusal to give instructions to the jury, the said Bill of Exceptions is hereby signed, sealed, settled and allowed as and for a full, true and correct Bill of Exceptions in this cause, and I hereby certify that the same with the exhibits separately certified be made a part hereof contains all of the evidence produced at the trial. The Clerk is hereby directed to certify to the said exhibits as being a part of this Bill of Exceptions,

Dated at Boise, Idaho, this 12th day of April, A. D. 1917.

FRANK S. DIETRICH,  
*Judge.*

*In the District Court of the United States for the  
District of Idaho, Northern Division.*

Bertha D. Witkouski; and Charles F. Witkouski  
and Eugene D. Witkouski, minors by Bertha  
D. Witkouski, their guardian ad litem,  
*Plaintiffs,*

vs.

Consolidated Interstate-Callahan Mining Com-  
pany, a corporation,  
*Defendant.*

NOTICE.

To Bertha D. Witkouski; and Charles F. Witkouski and Eugene D. Witkouski, minors, by Bertha D. Witkouski, their guardian ad litem, and to Mr. Therrett Towles and W. H. Plummer, attorneys for plaintiffs:

You and each of you will please take notice that the foregoing bill of exceptions, complete in 222 pages, will be presented to the Honorable Frank S. Dietrich, Judge of the District Court of the United States for the District of Idaho, Northern Division, for settlement as a full, true and correct bill of exceptions in this case.

JAMES A. WAYNE,  
Attorney for Defendant.

*In the District Court of the United States for the  
District of Idaho, Northern Division.*

Bertha D. Witkowski; and Charles F. Witkowski  
and Eugene D. Witkowski, minors by Bertha  
D. Witkowski, their guardian ad litem,  
*Plaintiffs,*

vs.

Consolidated Interstate-Callahan Mining Com-  
pany, a corporation,

*Defendant.*

Service of the defendant's proposed bill of excep-  
tions in the above entitled action is hereby accepted  
and the receipt of a true and correct copy thereof  
admitted at Wallace, Idaho, this 6th day of January,  
A. D. 1917.

THERRET TOWLES,

Residence and Post Office address, Wallace, Idaho.

W. H. PLUMMER,

Residence and Post Office address, Spokane, Wash-  
ington.

*Attorneys for Plaintiffs.*

Lodged January 9, 1917.

W. D. McReynolds, Clerk.

Filed April 13, 1917.

W. D. McReynolds, Clerk.

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(Title of Court and Cause.)

No. 657.

PETITION FOR WRIT OF ERROR.

Comes now Consolidated Interstate-Callahan Min-  
ing Company, a corporation, defendant herein, and

says that on or about the 25th day of November, A. D. 1916, this Court entered judgment herein in favor of the plaintiffs and against the defendant, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error may issue in its behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

JAMES A. WAYNE,  
*Attorney for Defendant.*

Residence and Post Office Address:

Wallace, Idaho.

Filed Apr. 16, 1917.

W. D. McReynolds, Clerk.

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(Title of Court and Cause.)

No. 657.

### ASSIGNMENT OF ERRORS.

The above named defendant, in support of its petition for a writ of error in the above entitled cause, makes the following assignment of errors which it avers were committed by the Court in the rendition of the judgment against this defendant appearing upon the record herein, to-wit:

## I.

The trial court erred in overruling and denying defendant's motion for a non-suit made herein at the close of the testimony introduced in behalf of the plaintiffs, because the evidence introduced by said plaintiffs was insufficient to make out a case for the jury, in each of the following particulars and for each of the following reasons, to-wit:

(a) The plaintiffs failed to prove any of the charges of negligence set forth in their complaint. It was alleged in the complaint and sought to be proven upon the trial that the defendant was negligent (1) in employing a hoistman, Joe Egbert, who was incompetent, inexperienced, nervous and excitable, and which facts were known to the defendant, and (2) in failing to furnish the deceased with a reasonably safe place for the performance of the duties required of him, and (3) in failing to furnish the deceased with proper, safe, suitable and adequate machinery, tools and appliances for the performance of the work required of him in that the bolts, lugs and keys by which the clutch was fastened to the shaft of the drum of the hoist were loose, worn out, unsafe and inadequate, and that the brake band and clutch were worn out, loose, inadequate and unsafe, and that the clutch and the band thereof could not be adjusted by said lever under the control of the hoistman so as to retard and control the speed of said hoist and prevent the same from attaining a dangerous rate of speed and from falling to the bottom of said shaft, and (4) that defendant was oper-

ating through a vertical shaft more than two hundred and fifty (250) feet in depth without having said shaft equipped with a mine cage, skip or bucket fitted with safety clutches, in violation of the state law, and (5) that the bucket was lowered at a greater speed than six hundred (600) feet per-minute in violation of the state law, and (6) that a copy of the Idaho Mining code and a copy of the bell signals had not been properly posted as required by the state law, and (7) that the defendant had not promulgated proper and necessary hoist rules, and particularly a rule requiring the hoist to be raised and lowered before permitting men to be transported therein, and (8) that the defendant was negligent in not having its master mechanic make proper and reasonable inspections of the hoisting machinery and apparatus; but the evidence introduced by the plaintiffs failed to prove any single charge of negligence as set forth in said complaint and herein.

(b) Because it did appear from the evidence introduced by plaintiffs that there was no actionable negligence on the part of the defendant which was the proximate cause of the accident to the deceased complained of in plaintiff's complaint in this case.

(c) Because it appeared from the evidence that the deceased at the time of his accident was guilty of contributory negligence in, (1) in attempting to descend in the bucket before complying with the rules of the defendant requiring one round trip to be made before men were hoisted or lowered in said bucket, and (2) in descending before ascertaining



whether or not the clutch bolt had been tightened when the deceased knew, or by the exercise of reasonable care should or could have known that by reason of the work in which he and his co-laborers were engaged immediately preceding the accident, that the clutch bolt would necessarily have been loosened, and (3) in attempting to leap from said bucket after it had attained a dangerous rate of speed.

(d) Because it appears from the evidence that the instrumentalities, machinery, and apparatus furnished by the defendant were reasonably safe, adequate and in a good state of repair, and that the accident to the deceased was due to the negligence of a fellow servant, or fellow servants, in not using properly an instrumentality, machine or apparatus which was in itself reasonably safe, but which was rendered unsafe by reason of its improper use by a fellow servant, or fellow servants of the deceased; for the negligence of which said fellow servant or fellow servants the defendant was not responsible.

(e) Because it appeared by the evidence that the deceased knew, or by the exercise of reasonable care and prudence could or should have known and appreciated, the risk to which he was subjected at the time of his accident, (1) because of his knowledge of the work which was being performed immediately preceding his accident and his knowledge of the manner in which such work was customarily performed, and (2) because he had been advised and informed by the hoistman Lytton that the clutch bolt had been loosened by the men that preceded the

deceased and his crew in the work of removing the kinks from the cable, and that deceased therefore assumed such risks, and that his accident resulted from an assumed risk.

(f) Because it appeared from plaintiff's complaint and the evidence adduced in behalf of the plaintiffs that there was no actionable negligence on the part of the defendant which served as the proximate cause of the accident to the deceased.

(g) Because it affirmatively appeared from the evidence introduced by the plaintiffs that the defendant had performed its full duties of furnishing the deceased with a reasonably safe place to work, with reasonably safe instrumentalities with which to work, with competent co-servants, had promulgated proper and reasonably adequate rules, and had inspected with reasonable frequency and regularity and with reasonable thoroughness the instrumentalities so furnished by it, and had not failed in the discharge of any duty which it owed the said deceased.

## II.

The trial court erred in overruling and denying defendant's motion for a non-suit renewed at the close of all of the testimony and upon the same grounds that the original motion for non-suit was made, and also in overruling defendant's motion for a directed verdict for defendant upon the same and additional grounds at the close of the whole testimony, because in addition to the grounds and reasons hereinbefore specified, the evidence was insufficient to warrant the submission of the case to the jury, or

a recovery by the plaintiff of any sum whatever, in the following particulars:

(a) Because it appeared from all the evidence in the case that the deceased assumed every risk, and the risk of every defect mentioned in the complaint and mentioned in the evidence as grounds of negligence, and that he knew and appreciated and assumed every risk growing out of the several grounds of negligence set forth in said complaint.

(b) Because it appeared from all the evidence that the deceased met with his accident solely and entirely by reason of his own negligence, or his contributory negligence.

(c) Because it appeared from all of the evidence that if the accident was not due to the negligence of the deceased himself, it was due to the negligence of a fellow servant or fellow servants whose negligence was one of the risks assumed by the deceased and for which negligence the defendant is not liable.

(d) Because the evidence in its entirety failed to prove any actionable negligence on the part of the defendant which served as the proximate cause of the accident to the deceased.

### III.

The court erred in giving the following portion of his oral instructions to the jury, to-wit:

“In other words, one who is charged with the duty of performing what it is the master’s duty to do, here the defendant company’s duty to do, of keeping the mine in safe condition, or the instrumentalities in safe condition, cannot be a

fellow servant or employe with another, so that in this case if you find that the accident was the result of the negligence of some one who was acting for or in the mechanical department, rather than the operating department, then that is a risk from another employe of the defendant company which the deceased did not assume. He assumed risks from the negligence of fellow employes when those employes were in his department, the mining department, rather than the mechanical department.

#### IV.

The court erred in giving the following portion of his oral instructions to the jury, to-wit:

“And I have to say to you that the evidence very strongly tends to show that the condition of this screw or bolt, or nut is the proximate cause of the injury, or the accident, rather, and is the only immediate cause of the accident. There is some evidence tending to show that the shaft of the drum was sprung. However, the plaintiffs do not allege, and, as I understand, do not claim now, that this sprung condition of the shaft, even if you credit that testimony, directly contributed to the accident. That was brought in only for the purpose of attempting to explain why it was necessary to loosen this screw, or bolt, or nut. The defendant contends that it was not sprung, and that that is not the reason for loosening the bolt or nut, and the plaintiff contends that it was. But it is not alleged, and

it is not now claimed, that the condition of the shaft of the drum in anywise affected the operation of the hoist upon the evening in question at the time the accident occurred. In other words, the clutch would not have held any better had the shaft been in perfect condition, if it was not in perfect condition. The fact, if it be a fact, that the shaft was sprung, did not in any wise affect the hoist man's control of the hoisting machinery at the time in question. There is some evidence also tending to show that certain keys were loose in and about the mechanism which controlled the clutch or had to do with the operation of the drum, but I have to say to you that there is no substantial evidence tending to show that the condition of these keys in any wise affected the hoist man's control of the hoist at that time."

#### V.

The court erred in giving the following portion of his oral instructions to the jury, to-wit:

"Now then, gentlemen, if from all of the evidence you find that Mr. Witkouski did not have control of the hoist, that he was not charged with the responsibility of keeping it in repair, if he did not have the direction of the hoist man as to what should be done from time to time in seeing that the hoist operated properly, but that he could only direct him in so far as giving him the signals and telling him when the hoist should go up and go down, and how rapidly, and so forth,



and further that the hoist man, in so far as the mechanical work of keeping this hoist in condition was concerned, was under the control and direction of the mechanical department, ultimately the master mechanic, then you could not find that the hoist man is a fellow servant with the deceased, and therefore the negligence of the hoist man in loosening this screw and leaving it loose, would not be a risk that the deceased would have taken, and if he was injured as a consequence of such negligence then the plaintiffs here could recover."

#### VI.

The court erred in giving the following portion of his oral instructions to the jury, to-wit:

"You will see that the whole issue there is as to whether or not the hoist man was under the control of Witkouski so far as the mechanical work was concerned of keeping this hoist in condition, or whether he was under the control and direction of the mechanical department, and therefore was representing the master in the performance of this primary duty of keeping the appliances and instrumentalities in a proper condition of repair."

#### VII.

The court erred in giving the following portion of his oral instructions to the jury, to-wit:

"Perhaps, to sum up, and to state what I have already said to you in a somewhat different way,



if you find from the evidence that the witness Lytton, who was the hoist man on the shift immediately preceding him, was under the direction and exclusive command and authority of the master mechanic or general foreman, or both, and that Witkouski had no authority over or right to give orders to or direct said Lytton as to the matters and things incident to or pertaining to keeping said hoist in a reasonably safe condition of repair and efficiency, and the said Lytton, when he went off shift, left the same in an unsafe condition of repair and efficiency, without notifying the succeeding engineer, Egbert, of such condition, and that his failure to so notify said Egbert was the proximate cause, or contributed to the death of the deceased Witkouski, then you should find for the plaintiffs."

### VIII.

The trial court erred in entering judgment for plaintiffs and against the defendants herein for the sum of Fifteen Thousand (\$15,000.00) Dollars upon the verdict of the jury, and in entering the judgment for the amount of said verdict.

### SPECIFICATIONS WHEREIN THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE VER- DICT OF THE JURY AND JUDGMENT THEREON.

The evidence is insufficient to sustain the verdict of the jury and the judgment thereon in the following particulars and for the following reasons, to-wit:

## I.

There is no evidence that the defendant was negligent in employing and keeping in its service the hoist man operating the hoist at the time of the accident, or that said hoist man was incompetent, inexperienced, nervous, or excitable, but on the contrary the evidence affirmatively shows that said hoist man, except upon this single occasion, was a careful, prudent man.

## II.

There is no evidence that the defendant failed to furnish the deceased with a reasonably safe place to work, but on the contrary the evidence affirmatively shows that the place where deceased was called upon to perform his duties was reasonably safe.

## III.

There is no evidence that the defendant was negligent in failing to furnish to the deceased proper, safe, suitable, and adequate machinery, tools and appliances for the performance of the work required of him, or that the bolts, lugs and keys by which the clutch was fastened to the shaft of the drum of the hoist were loose, worn out, unsafe, and inadequate, or that the brake band and clutch thereon were worn out, loose, inadequate, and unsafe, or that said clutch and the band thereof could not be adjusted by said lever under the control of the hoist man so as to retard and control the speed of said hoist, but on the contrary the evidence affirmatively shows that said hoist was in a reasonably safe condition.

## IV.

There is no evidence that the shaft in which deceased was working was not equipped with a cage, skip, or bucket fitted with safety clutches, but on the contrary the evidence shows that said shaft was equipped with a proper bucket fitted with safety clutches.

## V.

There is no sufficient evidence to show that the men were lowered by the defendant into its shaft at a greater speed than six hundred (600) feet per minute, but on the contrary the evidence does show that the defendant had promulgated a rule restricting the speed to less than six hundred (600) feet per minute and that if said rule, or said law was violated, it was only upon the single occasion when the deceased met with his accident and was due to the negligence of a fellow servant.

## VI.

That there was no evidence that the defendant was negligent in not promulgating proper and necessary hoist rules and regulations, and particularly a rule requiring the hoist to be raised and lowered before permitting men to be transported therein, but on the contrary the evidence does show that such rules had been promulgated and that their non-observance upon the occasion of the accident to the deceased, if such rules were not observed at said time, was due to the negligence of the deceased himself, or to the negligence of a fellow servant.

## VII.

There is no evidence that the defendant was negligent in not having its master mechanic make proper and reasonable inspections of the hoisting machinery and apparatus, but on the contrary the evidence affirmatively shows that reasonable and proper inspections of said hoisting machinery and apparatus were required to be made and were in fact made by the defendant's master mechanic.

## VIII.

There is no evidence of any negligence on the part of the defendant which was the proximate cause of the accident to the deceased. While the evidence does disclose the fact that a short time prior to the accident to the deceased, the hoist man on the preceding shift had loosened the clutch bolt, and while there is some evidence that the loosening of this bolt was made necessary by reason of the drum on the shaft being slightly sprung, and while there is evidence tending to show that said hoist engineer had failed to tighten said clutch bolt, or report his failure to do so to the succeeding hoist man, yet the evidence affirmatively shows that said hoist could still be controlled by the hoist man by means of the proper application of the compressed air and by means of a brake provided for that purpose, and that the rapid descent of the bucket at the time of the accident was due to the failure of the hoist engineer to properly operate said hoist, and not to the sprung condition of the drum, nor to the loosened condition of such clutch bolt.

## IX.

The evidence discloses that the proximate cause of the accident to the deceased was due to the negligence of a fellow servant or servants. In this respect the evidence shows that Lytton, the hoist man on the crew preceding the crew of the deceased, had loosened the clutch bolt, and that all of the men upon said preceding crew had been engaged in the operation of taking the kinks out of the cable; that when the deceased and his crew went on shift the work of taking the kinks out of the cable had not been completed and that deceased and his crew continued the work of the preceding crew; the evidence shows that all of the men on both of these crews were, as a matter of law, fellow servants, and that whether the proximate cause of the injury was (as stated by the trial court) the loosening of the clutch bolt and the failure to tighten the same, or was the careless operation of said hoist by the hoist engineer, that in either case the negligence which served as the proximate cause for the injury was the negligence of a fellow workman.

## X.

The evidence discloses that the deceased had on other occasions assisted in taking kinks out of the cable and knew that it was customary to loosen the clutch bolt to permit of the easier unwinding of the cable; the deceased knew that this had been done when he went to work on the night of his accident; the evidence discloses that without enforcing the rule which required the hoist to be lowered and raised



before permitting the men to be carried thereon, and without ascertaining whether the clutch bolt had been tightened, the deceased with his men stepped upon the bucket and ordered the lowering thereof; and the evidence shows that in doing so the deceased assumed the risk and every risk of descending in the bucket under the above mentioned conditions and circumstances.

## XI.

And for the same reasons and in the same particulars as mentioned in the last foregoing specification, the deceased was guilty of contributory negligence in descending in said bucket under the conditions mentioned in the last foregoing specification, and the evidence further discloses that the deceased had been warned that said clutch bolt had been loosened and was therefore guilty of gross negligence in descending in said bucket without ascertaining whether or not the said clutch bolt had been tightened.

And the evidence further discloses the fact that the men who remained on the bucket were not injured and that the accident to the deceased was due to his negligence in leaping from said bucket.

Comes now the defendant in this action and in connection with its petition for a writ of error makes and proposes and files the foregoing assignment of errors which it avers occurred upon the trial of the said cause, together with its specifications wherein the evidence is insufficient to sustain the verdict or



judgment thereon, and prays that because thereof the judgment in the District Court may be reversed.

JAMES A. WAYNE,

*Attorney for Defendant.*

Filed Apr. 16, 1917.

W. D. McReynolds, Clerk.

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(Title of Court and Cause.)

No. 657.

ORDER ALLOWING WRIT OF ERROR.

On this 16th day of April, 1917, came the defendant by its attorney, and filed herein and presented to the Court its petition praying for the allowance of a writ of error, an assignment of errors intended to be urged by it, praying also that the transcript of the record and proceedings, and papers upon which the judgment herein is rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had that may be proper in the premises.

On consideration whereof the Court does allow the writ of error upon the defendant giving bond according to law in the sum of Seventen Thousand (\$17,000.00) Dollars which shall operate as a super sedeas bond.

FRANK S. DIETRICH,

Judge of the United States District  
Court, for the District of Idaho.

Filed Apr. 16, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 657.

## BOND ON WRIT OF ERROR.

*Know All Men By These Presents*, That we, Consolidated Interstate-Callahan Mining Company, a corporation, as principal, and The Aetna Accident and Liability Company, a corporation organized and existing under and by virtue of the laws of Connecticut, having complied with all of the statutes of the United States authorizing it to become a surety on bonds in the courts of the United States, as surety, are held and firmly bound unto the defendants in error, Bertha D. Witkouski; and Charles F. Witkouski, and Eugene D. Witkouski, minors, by Bertha D. Witkouski, their guardian ad litem, in the full and just sum of Seventeen Thousand (\$17,000.00) Dollars, to be paid to the said defendants in error, Bertha D. Witkouski; and Charles F. Witkouski, and Eugene D. Witkouski, minors, their certain attorneys, executors, administrators, or assigns; to which payment well and truly to be made we bind ourselves, our successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 14th day of April, A. D. 1915.

*Whereas*, Lately at a session of the District Court of the United States for the District of Idaho, Northern Division, in a suit pending in said court between Bertha D. Witkouski; and Charles F. Witkouski, and Eugene D. Witkouski, minors, by Bertha D. Witkouski, their Guardian ad Litem, as plaintiffs

and Consolidated Interstate-Callahan Mining Company, a corporation, as defendant, a judgment was rendered against the said Consolidated Interstate-Callahan Mining Company, upon a verdict of the jury in the sum of Fifteen Thousand (\$15,000.00) Dollars, and costs amounting to the sum of \$209.35.

*And Whereas*, The said defendant, Consolidated Interstate-Callahan Mining Company, considering it is aggrieved thereby, has obtained from the said court a writ of error to reverse and correct said judgment in that behalf, and a citation directed to the said plaintiffs, Bertha D. Witkouski; and Charles F. Witkouski and Eugene D. Witkouski, minors, citing and admonishing them to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, in the State of California;

*Now*, The condition of the above obligation is such, that, if the said Consolidated Interstate-Callahan Mining Company shall prosecute the said writ of error to effect, and answer all damages and costs if it fails to make the said plea good in said court, then the above obligation to be void, otherwise to remain in full force and virtue.

This bond is intended as a bond for costs on appeal and as a supersedeas bond.

THE AETNA ACCIDENT AND  
LIABILITY COMPANY,

(Seal.)

By Herman J. Rossi, Resident Vice President.  
Attest: R. Myers, Resident Assistant Secretary.  
(Duly verified.)

The foregoing bond is hereby approved this 16th day of April, 1917, and the same when filed shall operate as a bond for costs on appeal and as a super-sedeas bond.

FRANK S. DIETRICH,

Filed Apr. 16, 1917.

Judge.

W. D. McReynolds, Clerk.

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(Title of Court and Cause.)

PRAECIPE.

*To Mr. W. D. McReynolds, Clerk of the United States  
District Court, Boise, Idaho:*

Dear Sir:

You will please prepare transcript in the above entitled cause and include therein,

1. Writ of Error and Citation, Appeal Bond, Assignment of Errors and all other papers relating to this writ of error.

2. Judgment Roll.

3. Bill of Exceptions.

4. Copy of the Journal Entries.

And in the Judgment Roll you will please include

1. Complaint.

2. Demurrer to Complaint.

3. Answer.

4. Verdict.

5. Judgment.

JAMES A. WAYNE,

*Attorney for Defendant.*

Residence and P. O. Address, Wallace, Idaho.

Filed Apr. 16, 1917.

W. D. McReynolds, Clerk.

*In the District Court of the United States for the  
District of Idaho, Northern Division*

Bertha D. Witkouski; and Charles F. Witkouski,  
and Eugene D. Witkouski, minors, by Bertha  
D. Witkouski, their Guardian ad Litem,  
*Plaintiffs,*

vs.

Consolidated Interstate-Callahan Mining Com-  
pany, a corporation, *Defendant.*

No. 657.

### WRIT OF ERROR

The United States of America,  
Ninth Judicial District Circuit,—ss.

*The President of the United States, to the Honorable  
Judge of the District Court of the United States,  
for the District of Idaho, Greeting:*

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before you, or some of you, between Bertha D. Witkouski; and Charles F. Witkouski, and Eugene D. Witkouski, minors, by Bertha D. Witkouski, their Guardian ad Litem, Plaintiffs, and Consolidated Interstate-Callahan Mining Company, a corporation, Defendant, a manifest error hath happened, to the great damage of the said Consolidated Interstate-Callahan Mining Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and open-

ly, you send the record and proceedings aforesaid, with the things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you may have the same at San Francisco, California, in said Circuit on the 16th day of May, next, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 16th day of April, A.D. 1917, and in the (141) one hundred and forty-first year of the Independence of the United States of America.

Allowed by: FRANK S. DIETRICH,  
*United States District Judge.*

Attest: W. D. McREYNOLDS,  
*Clerk of the District Court of the  
United States, District of Idaho.*

Filed April 16, 1917. W. D. McReynolds, Clerk.



*In the District Court of the United States for the  
District of Idaho, Northern Division*

Bertha D. Witkouski; and Charles F. Witkouski,  
and Eugene D. Witkouski, minors, by Bertha  
D. Witkouski, their Guardian ad Litem,  
*Plaintiffs,*

vs.

Consolidated Interstate-Callahan Mining Com-  
pany, a corporation, *Defendant.*

No. 657.

CITATION ON WRIT OF ERROR

*To Bertha D. Witkouski; and Charles F. Witkouski,  
and Eugene D. Witkouski, by Bertha D. Witkou-  
ski, their Guardian ad Litem:*

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, California, in said Circuit, on the 16th day of May, next, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Idaho, Northern Division, wherein Consolidated Interstate-Callahan Mining Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the said judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable FRANK S. DIETRICH,  
District Judge of the United States District Court

at Boise, Idaho, within said circuit, this 16th day of April, in the year of our Lord one thousand nine hundred and seventeen and of the Independence of the United States of America the one hundred and forty-first.

FRANK S. DIETRICH,  
*United States District Judge.*

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RETURN TO WRIT OF ERROR

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

Attest: W. D. McREYNOLDS,  
(Seal.) *Clerk.*

We hereby, this 11th day of May, 1917 accept personal service of this citatio non behalf of Bertha D. Witkouski; and Charles F. Witkouski, and Eugene D. Witkouski, minors, by Bertha D. Witkouski, their Guardian ad Litem, Appellees.

THERRETT TOWLES,  
*Attorney for Appellees.*

Filed April 16, 1917. W. D. McReynolds, Clerk.

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(Title of Court and Cause.)

CLERK'S CERTIFICATE

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages

numbered from 1 to 303, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same, together constitute the transcript of the record herein upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of \$353.35, and that the same has been paid by the Plaintiff in Error.

Witness my hand and the seal of said court this 12th day of May, 1917.

W. D. McREYNOLDS,

(Seal.)

*Clerk.*

